87-628

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

WILLIAM H. BRANCH,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Did the court below err in holding that Section 315 of the Communications Act does not, by its plain language, exempt from equal opportunity requirements appearances by newscaster candidates on bona fide newscasts contrary to the holding of the Fifth Circuit in *Brigham v. FCC,* 276 F.2d 828 (5th Cir. 1960)?

2. Is Section 315 of the Communications Act constitutional despite recent findings of the Federal Communications Commission in *Syracuse Peace Council,* 2 FCC Rcd 5043 (1987) and *General Fairness Doctrine Obligations of Broadcast Licensees,* 102 F.C.C.2d 143 (1985) that broadcast frequencies are abundant and content controls chill speech?

PARTIES TO THE PROCEEDINGS

Petitioner William H. Branch ("Branch") is a newscaster for television station KOVR in Sacramento, California.

Respondents below are the Federal Communications Commission ("Commission") and the United States of America. The American Legal Foundation, Media Access Project, Telecommunications Research and Action Center, Media Access Project and Consumer Federation of America participated as Intervenors.

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Petitioner William H. Branch respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled proceeding on July 21, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 824 F.2d 37 and is reprinted in the appendix hereto ("App.") at 1a.

The opinion of the Federal Communication Commission ("Commission") on reconsideration is unreported and is reprinted at App. 33a. The Commission's initial decision is

reported at 101 F.C.C.2d 901 (1985) and is reprinted at App. 36a.

JURISDICTION

Petitioner sought a declaratory ruling from the Federal Communications Commission that the Commission may not constitutionally restrict the journalistic discretion of broadcast licensees and impair participation in political campaigns by enforcing Section 315 of the Communications Act of 1934 and that newscaster candidates are exempt from equal opportunities requirements of Section 315 pursuant to 1959 amendments to the Communications Act. The Commission denied that petition and a petition for reconsideration.

The Court of Appeals affirmed on July 21, 1987. The jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law...abridging freedom of speech, or of the press...."

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 315(a) (1982), provides in pertinent part:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other candidates for the office in the use of such broadcasting station.... Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on–the–spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

STATEMENT OF THE CASE

In 1969, this Court accorded broadcasters diminished first amendment status based on two factual assumptions: broadcast frequencies were less available than traditional media and FCC regulations had not been shown to inhibit speech. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). But the Court pledged to reconsider its holding if either conclusion was undermined in an appropriate case. *Id.* at 393. This is such a case.

William Branch is general assignment reporter at television station KOVR in Sacramento, California. His duties typically involve on–air appearances of approximately three minutes per day, covering stories selected by the station's assignment editor. Branch does not choose the subjects on which he reports or the amount of time allotted to each appearance. KOVR's assignment editor and newscast producer make these decisions.

Branch lives in Loomis, California, a rural community of approximately 4,000 people, thirty miles from Sacramento. He became involved in a drive to incorporate the community in 1982 after helping form a homeowner's association. This effort gained momentum, and the November 6, 1984 local elections included a referendum on the question of incorporation and a slate of candidates for the first Loomis town council.[1] Branch's neighbors urged him to run for one of the five non–salaried town council positions, and he decided to do so.

Section 315 of the Communications Act requires broadcasters to provide equal opportunities to candidates for public office whose opponents are allowed to "use" station facilities for on–air appearances. 47 U.S.C. § 315(a) (1982).[2] In 1959, Congress amended section 315 to exempt from equal opportunities requirements all candidate appearances on four categories of bona fide news programs: newscasts, news interviews, news documentaries and on–the–spot coverage of news events.

Branch was aware that if he became a candidate, his newscast appearances might trigger "equal opportunities" obligations under the Communications Act. He informed station management of his desire to run for office and asked their advice. KOVR news editors reluctantly told Branch that he must take an unpaid leave of absence during the campaign with no guarantee of resuming his duties after the election,

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[1]Petitioner informed station management of his civic involvement and voluntarily withdrew from covering stories relating to any aspect of the Loomis incorporation drive. This self–imposed moratorium remains in effect.

[2]Equal opportunities must be provided on the same basis as the initial use. If the first candidate purchased time, his opponents must be offered the same rate and time. If the first candidate was given airtime, his opponents must be offered free appearances as well. *See Law of Political Broadcasting and Cablecasting*, 100 F.C.C.2d 1476, 1507 (1984).

because of the significant amount of time the station would be required to donate to other candidates under section 315.[3]

Branch filed a request for declaratory ruling with the Commission, but was forced to drop out of the town council race because he could not get a ruling before the 1984 election. He nevertheless sought a declaration of his rights under section 315 and the First Amendment to the United States Constitution so that he may run for office in the future.

The Commission denied Branch's petition. It refused to consider the constitutionality of section 315 on the basis that "such constitutional decisions have 'generally been thought beyond the jurisdiction of administrative agencies.'" *In re William H. Branch*, 101 F.C.C.2d 901, 904 n.4 (1985) (quoting *Oestereich v. Selective Serv. Bd.*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring)). App. 40a.[4] The Commission also held that section 315 as applied does not discriminate against Branch because all candidates for public

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[3]KOVR would have been obligated to provide Branch's opponents an estimated 33 hours of free response time—the equivalent of one and one–half broadcast days—if Branch had stayed in the town council race.

[4]Less than three weeks after this decision, the Commission released its *General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985) ("*Fairness Doctrine Inquiry*") in which it concluded that it *is* obligated to review constitutional issues affecting its mandate. The Commission stated that, as the expert agency charged with administering the Communications Act, it should be involved in such matters because: (1) constitutional considerations are an integral component of the public interest standard; (2) the Commission's day–to–day experience in implementing broadcast regulations provides a unique perspective; and (3) the Supreme Court has relied on FCC representations in determining the constitutional validity of broadcasting regulations. *Id.* at 155–56. In August, 1987, the Commission relied on these findings to rule that the fairness doctrine violates broadcasters' first amendment rights. *Syracuse Peace Council*, 2 FCC Rcd 5043 (1987), *appeal pending sub nom. Syracuse Peace Council v. FCC*, No. 87–1516 (D.C. Cir., filed September 24, 1987) and *Geller v. FCC*, No. 87–1544 (D.C. Cir., filed October 5, 1987).

office are treated in the same manner. *Id.* Finally, the Commission rejected Branch's argument that the plain meaning of section 315 exempts appearances by newscaster candidates on bona fide newscasts. *Id.* at 42a. The Commission subsequently denied reconsideration. *Id.* at 33a.

The Court of Appeals affirmed, holding that *Red Lion* precludes Branch's first amendment challenge to section 315. *Id.* at 25a. The court noted:

> The Supreme Court recently reaffirmed *Red Lion* and disavowed any intention "to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376 n.11 (1984). The Commission may now have sent just such a signal by issuing a report which concludes that section 315 is unconstitutional and should be abandoned. *See General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985). But unless the Court itself were to overrule *Red Lion*, we remain bound by it. [App. 25a–26a (footnote omitted).]

The court also rejected Branch's claim that section 315 is unconstitutional as applied because it imposes an undue burden on his right to run for public office. It acknowleged that Branch was forced to choose between his job and his candidacy, but concluded "nobody has ever thought that a candidate has a right to run for office and at the same time avoid all personal sacrifice." *Id.* at 22a– 23a.

Finally, the court upheld the Commission's interpretation of section 315 exemptions to exclude newcaster candidates. In reaching this result, the court avoided the "apparent simplicity" of a literal reading of the statutory language and conducted its own survey of the legislative history. *Id.* at 8a, 9a–18a. It concluded that Congress amended section 315 to reverse a specific FCC decision and that the news exemptions apply only

when a candidate is "presented to the public as news." *Id.* at 15a.[5]

Neither the court nor the Commission suggested that Branch's newscast appearances resulted from political favoritism by KOVR or were presented for any reason other than a bona fide purpose to deliver the news.

REASONS FOR GRANTING THE WRIT

I. The Court Below Erred In Rejecting The Plain Meaning Of Section 315 Contrary To The Decision of The Fifth Circuit In Brigham v. FCC

The court below held that section 315 requires broadcast stations to provide equal opportunities in response to appearances by newscaster candidates despite the plain statutory language creating an exemption from such requirements for an "[a]ppearance by a legally qualified candidate on any...bona fide newscast." App. 7a–20a. This holding conflicts directly with the Fifth Circuit decision in *Brigham v. FCC*, 276 F.2d 828 (5th Cir. 1960) (*per curiam*) which held that appearances by a newscaster candidate are exempt under section 315. This Court should grant the writ to resolve this conflict over the extent to which courts are free to embellish statutory language with their own readings of legislative history.

The court below looked beyond the language of section 315 to find the purpose for which 1959 amendments to the section were adopted. It concluded that the amendments,

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[5]In a concurring opinion, Judge Starr found that Branch's reading of section 315 is "a more natural statutory interpretation" than the one offered by the FCC, but concluded that the Court must defer to the Commission's interpretation under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). App. at 30a–31a.

which exempted candidates' newscast appearances, were adopted solely to overrule the Commission's decision in the *Lar Daly* case.[6] The court quoted liberally from floor debates and held that Congress intended merely to restore the law to to its pre–*Lar Daly* state. App. 12a–13a. Although it acknowledged that the 1959 amendments were broader than the factual parameters of *Lar Daly*, the court below concluded that the news exemptions apply to candidate appearances only when they are part of a news event being covered. *Id.* at 14a–16a.[7] The court noted that the Commission initially exempted appearances by newscaster candidates after the amendments were adopted, but that, upon a more comprehensive analysis of the legislative history, the FCC "has faithfully adhered to its current position for more than twenty years."[8]

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[6]In *Lar Daly*, the Commission held that broadcast licensees were obligated to provide equal opportunities for broadcast time in response to candidate appearances on newscasts. *In re CBS, Inc.*, 26 F.C.C. 715 (1959).

[7]In his concurring opinion, Judge Starr disagreed that Congress necessarily intended the amendments to extend only to coverage of the candidate that is presented to the public as news. *Id.* at 30a. He concluded, however, that congressional intent was ambiguous and that the court must defer to the Commission's interpretation of its governing statute. *Id.* at 31a.

[8]App. 20a. The Commission initially held that section 315 obligations do not apply to on–air appearances of a weatherman who was a candidate. *In re KWTX*, 40 F.C.C. 304, *aff'd sub nom. Brigham v. FCC*, 276 F.2d 828 (5th Cir. 1960). It subsequently reversed its position in *Use of Station by Newscaster Candidate*, 40 F.C.C. 433 (1965). But the Commission's consistency since 1965 may largely be explained by the fact that the question of newscaster candidates had not again been raised until Branch filed his petition in 1984. Other questions involving section 315 were raised during this period and the Commission regularly adopted a more liberal approach to the exemptions. *E.g., Aspen Institute Program on Communications & Society*, 55 F.C.C.2d 697 (1975), *aff'd sub nom. Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976); *Henry Geller*, 95 F.C.C.2d 1236 (1983).

By sharp contrast, the Fifth Circuit in *Brigham* applied the plain language of section 315 amendments to exempt an appearance by a weather reporter. The court stated that:

> There is not the slightest hint in the undisputed facts that this weathercaster's appearance involved anything but a bona fide attempt to present the news.... [H]is employment is not something arising out of the election campaign but, rather, is a "regular job." Certainly the facts do not indicate any favoritism on the part of the station licensee or intent to discriminate among candidates. [276 F.2d at 830].

Hence, that court upheld the Commission's decision to exempt on–air appearances by a newscaster candidate.

The court below criticized the *Brigham* for failing to "mention the legislative history, [and] focus[ing] instead on the fact that no favoritism had been shown." App. 19a. It suggested that courts must look to such sources of intent by concluding "[n]o tribunal that has considered the language of section 315 in light of its legislative history has ever endorsed Branch's reading of the statute, and we also reject it." *Id.* at 20a.

This conflict underscores the need for review by this Court. More extensive analysis of the legislative history is not necessarily a better guide to legislative intent, as the court below suggests. Rather, the relevant inquiry asks the extent to which judges may consult legislative history in the face of a clear statutory text. The answer to this question gains added significance when background materials from the legislative process lead to a result that conflicts with the words Congress adopted as law or when such an interpretation creates a

potential constituional problem.[9] In the context of this case, may section 315 language exempting candidate appearances on "any bona fide newscast" be read to mean that some such appearances are exempt, while others are not?

Well established principles governing statutory interpretation suggest that the lower court erred by relying on legislative history to interpret section 315 so as to limit the scope of the words Congress adopted. Excessive use of such history as a guide to statutory interpretation creates the danger that courts may usurp functions which properly reside in the legislative and executive branches. *See Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395–96 (1951) (Jackson, J., concurring). *See also INS v. Cardoza Fonseca*, 107 S. Ct. 1207, 1224 (1987) (Scalia, J., concurring). Thus, courts apply the general rule that statutory language must ordinarily be regarded as conclusive "[a]bsent a *clearly expressed* legislative intention to the contrary." *North Dakota v. United States*, 460 U.S. 300, 312 (1983), quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (emphasis added). There is a "strong presumption that Congress expresses its intent through the language it chooses," and courts will examine legislative history only to determine whether there is an evident dispute with the plain meaning. *See Cardoza Fonseca*, 107 S. Ct. 1207, 1213 & n.12.

Failure to follow this basic premise often leads to inconsistent results. In this case, Branch presumably would have been able to run for office if he were a reporter in Dallas, Texas, within the Fifth Circuit's jurisdiction, rather than Sacramento. In addition to conflicts between circuits, there is

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[9] As noted *infra*, section 315 limits Branch's and KOVR's journalistic choices and burdens Branch' ability to seek public office. Unless there is a "clear[] congressional directive," a court should avoid construing a statute in ways that create arguable first amendment problems. *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1008 (1984).

also the risk of piecemeal interpretations can lead to disparate rulings even within the same circuit.

The court's narrow view of section 315 amendments in this case resulted from its focusing more on legislators' statements about the *Lar Daly* decision than the language Congress ultimately adopted. Although *Lar Daly* clearly was the catalyst for the legislation, making numerous debate references understandable, it did not circumscribe the amendments. The bill introduced in the House of Representatives dealt almost exclusively with reversing *Lar Daly*.[10] But Congress passed the Senate bill instead, which contained language preserving the Commission's fairness doctrine.[11] This provision was added in recognition that the 1959 amendments increased broadcasters' news discretion generally, *see, e.g., Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 517 (D.C. Cir.), *reh'g denied*, 806 F.2d 1115 (1986), *cert. denied*, 107 S. Ct. 3196 (1987) ("*TRAC*"), and would have been surplusage if Congress was merely repealing *Lar Daly*. Its addition is plainly inconsistent with the view that Congress amended section 315 for the purpose suggested by the court below.

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[10] *See generally* H.R. Rep. No. 802, 86th Cong., 1st Sess. (1959).

[11] See S. Rep. No. 562, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2564; Conf. Rep. No. 1069, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2582. The Senate bill led to the addition of the following language:

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Similarly, the fact that the Commission did not exempt appearances by newscaster candidates before the 1959 changes does not control how the amendments should now be interpreted.[12] The Commission did not exempt candidate debates before the *Lar Daly* decision,[13] yet the D.C. Circuit has held that Congress created such an exemption when it amended section 315. *Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976). The FCC's treatment of debates before *Lar Daly* is flatly inconsistent with the court's conclusion that Congress intended only to exempt candidate appearances that are part of a news story. App. 15a–16a. The legislators' statements cited by the court suggest that Congress intended to exempt coverage of news events, there is no clear indication that it did not also extend the exemption to cover an editor's choice of reporters (including a reporter who may happen to be a candidate). By contrast, Congress expressly considered and rejected a proposal that the exempt program categories include "debates."[14] Nevertheless, both the Commission and the courts recognized that such programs are covered by the statutory language. *Id.* at 359.

Other D.C. Circuit decisions support the position that the amendments were broadly remedial and were designed to increase broadcaster discretion while retaining restrictions on favoritism. *League of Women Voter's Education Fund v. FCC*, 731 F.2d 995 (D.C. Cir. 1984), *aff'ing Henry Geller*, 95 F.C.C.2d 1236, 1244 (1983) ("the common denominator of all exempt programming is bona fide news value"); *Kennedy for President Committee v. FCC*, 636 F.2d 417, 425, 427

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[12] App. 9a. The court cited *Use of Broadcast Facilities by Candidates for Public Office*, 23 Fed. Reg. 7817, 7817–18 (1958) (codifying the Commission's determinations of what constitutes a "use").

[13] *See id.*; *Use of Broadcast Facilities by Candidates for Public Office*, 19 Fed. Reg. 5948 (1954) (citing cases).

[14] *See* S. Rep. No. 562, *supra* note 11 (Additional views of Sen. Hartke).

(D.C. Cir. 1980). It is easier to reconcile the weight of authority in the D.C. Circuit with *Brigham* than it is the lower court's decision here. This Court should grant the writ to resolve the conflict created by the court below.

II. The Decision Below Conflicts With Findings of the Federal Communications Commission Which Undermine the Constitutional Standard Governing Section 315

Broadcasters receive a lower level of protection under the first amendment than do "traditional" speakers, even though the factual assumptions underlying this treatment are no longer supportable. Despite its extensive findings in other proceedings that broadcast content controls chill speech and that broadcast frequencies are abundant, the Federal Communications Commission has concluded it is powerless to recognize full first amendment rights for broadcasters in the face of section 315. The Court of Appeals similarly has questioned the theoretical justifications for broadcasters' second class status,[15] but has held that it is bound by *Red Lion* until this Court overrules it. App. 25a–26a. In the meantime, William Branch, KOVR and all other broadcasters must endure editorial intrusions by the government that would never be tolerated if they wrote their words on paper instead of transmitting them over the air. This Court should grant the writ to finally resolve this vital issue.

In *Red Lion*, this Court for the first time addressed the constitutional validity of the fairness doctrine, which, like section 315, compelled broadcasters to provide response time

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[15] *See, e.g., TRAC*, 801 F.2d at 506-09; *Meredith Corp. v. FCC*, 809 F.2d 863, 866-67 (D.C. Cir. 1987); *Loveday v. FCC*, 707 F.2d at 1459.

in certain situations.[16] It upheld these content controls "in view of the scarcity of broadcast frequencies," 395 U.S. at 400, and dismissed as "speculative" concerns that broadcasters would engage in self–censorship to avoid regulatory entanglements. *Id.* at 393. But the Court stressed that the potential for chilling speech was "a serious matter," and made clear that "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." *Id.*

This Court has recognized consistently that its conclusions regarding the constitutional validity of broadcast content controls are not immutable. The first amendment balance could shift "because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973).

The Federal Communications Commission plays an essential role in this on–going process. As the expert agency established by Congress to regulate broadcasting, it "possesses more than fifty years of experience with the day–to–day implementation of regulation." *Syracuse Peace Council*, 2 FCC Rcd at 5046. Thus, the Court has noted that the public interest standard of the Communications Act "necessarily invites reference to First Amendment principles," and that "the

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[16] In general, the fairness doctrine required broadcasters to air balanced presentations of "controversial issues of public importance." Under this policy a licensee could be ordered to supplement its programming if the Commission found a presentation to be one–sided. 47 C.F.R. § 73.1910 (1986). Two corollaries—the personal attack and political editorial rules—required station licensees to notify the subject of an attack or the opponent of a candidate endorsed in a broadcast and offer appropriate response time. *Id.* §§ 73.1920, 73.1930. Since August, 1987, the Commission no longer enforces the fairness doctrine because of its finding that the rule violates broadcasters' first amendment rights. *Syracuse Peace Council*, 2 FCC Rcd 5043.

[balancing] process must necessarily be undertaken within the framework of the regulatory scheme." *CBS, Inc.*, 412 U.S. at 102, 122.

The Commission's regulatory mandate requires it to assess the nature of broadcasting and related industries as well as the impact of its rulings on licensees. Both inquiries have constitutional significance. This Court has noted that if the Commission demonstrated that the fairness doctrine "'[has] the net effect of reducing rather than enhancing' speech, we would then be forced to reconsider the constitutional basis of our decision in [*Red Lion*]." *FCC v. League of Women Voters of California*, 468 U.S. 364, 379 n.12 (1984). Likewise, the Court has indicated that it may be willing to reassess its traditional reliance on spectrum scarcity upon some "signal" from Congress or the Commission "that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *Id.* at 376–77 n.11.

The "signal" described by the Court was sent this past August. The Commission concluded in *Syracuse Peace Council* that "the factual predicates underlying [*Red Lion*] had eroded," and held that it no longer could enforce the fairness doctrine. 2 FCC Rcd at 5043–44. In presenting the matter for the Commissioners' consideration, the FCC's General Counsel referred to the *League of Women Voters'* suggestion that *Red Lion* might be reconsidered and proclaimed, "We agree that it is time to revisit and revise [the first amendment standard for broadcasting]; and [we] urge[] the Supreme Court to do so."[17]

The Commission concluded after a comprehensive inquiry that "the Supreme Court's apparent concern that listeners and viewers have access to diverse sources of information has now been allayed." *Syracuse Peace Council*, 2 FCC Rcd at 5053. It found that the number and capabilities of media outlets have been vastly expanded since the Supreme

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[17]Presentation and Statement of Diane S. Killory, General Counsel, Federal Communications Commission, Open Meeting, August 4, 1987.

Court decided *Red Lion*. For example, the Commission noted that there were 1,315 television stations in the United Stated in August 1987—up 57 percent from 1969. The number of radio stations increased during the same period by 54 percent, to a total of 10,128. *Id.* at 5053.[18] The Commission also found that cable television increased exponentially in the years following Red Lion and that new electronic technologies, such as low power television, multi–channel multipoint distribution service ("MMDS"), video cassette recorders ("VCRs"), and satellite master antenna television ("SMATV"), all unavailable in 1969, are "contributing significantly to the diversity of information available to the public." *Id.* In light of these facts, the Commission urged this Court "to reconsider its application of diminished First Amendment protection to the electronic media." *Id.* at 5058.[19]

The Commission concluded independently that content controls chill the free exercise of broadcast speech. In 1969, the Court treated "speculation" regarding a chilling effect as "a serious matter," but upheld the fairness doctrine until experience with its administration demonstrates that it has the net effect of dampening speech. *Red Lion*, 395 U.S. at 393.

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[18]Putting these figures into perspective, the Commission found that 96 percent of television households receive five or more signals. 2 FCC Rcd at 5053. At the same time, there are 1,657 daily newspapers in the United States, and only 125 cities have two or more local newspapers. *Id* at 5054.

[19]The Commission also concluded that the scarcity rationale, which courts historically used to justify a lower level of first amendment protection for broadcasters, was based on a distinction insufficient to support a constitutional difference. Although it conceded that broadcast frequencies are scarce in the economic sense, the Commission pointed out that the same is true of "'newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism.'" *Syracuse Peace Council*, 2 FCC Rcd at 5054, quoting *TRAC*, 801 F.2d at 508. It therefore concluded that "in analyzing the appropriate First Amendment standard to be applied to the electronic press, the concept of scarcity—be it spectrum or numerical—is irrelevant." *Id.* at 5054.

That oppressive experience now has been chronicled in the Commission's 1985 *Fairness Doctrine Inquiry* and *Syracuse Peace Council*.. Upon completing a thorough review of the doctrine's impact,[20] the Commission found that "the record...overwhelmingly demonstrated that broadcasters...limit the amount of controversial issue programming presented on the airwaves" because of the fairness doctrine. *Syracuse Peace Council*, 2 FCC Rcd at 5050. Consequently, it concluded that "the fairness doctrine, on its face, violates the First Amendment and contravenes the public interest." *Id.* at 5043.

The same conclusions regarding the chilling effect of content controls apply to section 315. This Court has made clear that:

> [i]n terms of constitutional principle...the personal attack and political editorial rules are indistinguishable from the equal–time provision of § 315, a specific enactment of Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements. [*Red Lion*, 395 U.S. at 391.]

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[20]No emprical assessment of the fairness doctrine's effect on broadcast speech had ever been conducted before the *Fairness Doctrine Inquiry*. 102 F.C.C.2d at 158. Accordingly, the Commission embarked on a "searching and comprehensive reexamination of the fairness doctrine." *Id.*, quoting *Notice of Inquiry in Gen. Docket No. 84-282*, 49 Fed. Reg. 20317, 20318 (May 14, 1984). More than one hundred parties submitted formal written comments in the proceeding, while many others provided informal comments and/or oral testimony. *See* 102 F.C.C.2d at 146. The Commission received additional comments regarding the fairness doctrine's constitutionality on remand in *Syracuse Peace Council*. The FCC received comments from approximately fifty individuals, broadcasters, advertisers, public interest groups, trade associations, governmental entities and others. 2 FCC Rcd at 5045.

Accordingly, the 1985 *Fairness Doctrine Inquiry* documented numerous cases in which the fairness doctrine stifled the presentation of political advertisements.[21]

Consistent with these findings, the Commission in 1986 recommended that Congress repeal section 315. It pointed out that "section 315 imposes a hierarchy of speech values which unnecessarily and improperly restricts the discretion of broadcasters in fulfilling their public interest obligations and journalistic responsibilities." Federal Communications Comm'n, *Legislative Proposal*, 926 (Jan. 30, 1986). Because section 315 "forces broadcasters to commit substantial time blocks, particularly in multi–candidate races...the practical result of this policy has been that broadcasters often exercise the discretion not to give or sell *any* time to candidates in some races." *Id.* (emphasis in original). Therefore, the Commission concluded:

> Repeal of Section 315...would permit the vast majority of broadcasters who are anxious to serve their communities to present the significant candidates for public office, at every level, in meaningful discussions...without the need to resort to the artifice of "exempt news programs." [*Id.*]

Section 315 undeniably restricts the first amendment rights of Branch and KOVR. Branch's career as a newscaster was threatened as a direct result of the "equal opportunities" requirements and KOVR was forced to limit its editorial choices because of 315. Neither the court below nor the Commission questioned these facts. Rather, they dutifully upheld the restrictions under the *Red Lion* standard, while simultaneously noting the erosion of the factual predicates for that standard.

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[21] 102 F.C.C.2d at 174–79. Although the Commission's findings in this proceeding related to advertisements promoting political issues, the incentives affecting candidate appearances under section 315 are the same.

Only this Court can reconcile the law with the current media environment.[22]

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[22]Section 315 also violates Branch's first amendment rights by conditioning his right to run for elective office on his willingness to sacrifice his career as a broadcast journalist. This Court has firmly rejected government attempts to impose conditions on the exercise of constitutional rights. Specifically, in *McDaniel v. Paty*, 413 U.S. 618 (1978), it struck down a state law that would have forced a clergyman to resign his church position in order to run for state office.

Restrictions on candidate speech will be upheld *only* if narrowly drawn to serve a compelling state interest. *Brown v. Hartlage*, 456 U.S. 45, 54–55 (1982). In this connection, this Court will be no more tolerant of indirect abridgements of campaign speech than it is overt censorship. The fact that the statute's *practical effect* may be to *discourage* protected speech is sufficient to characterize it as an infringement on First Amendment activities. *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 107 S. Ct. 616 (1986).

These bedrock principles preclude applying section 315 so as to deny Branch's right to run for office. Although the court below opined that "nobody has ever thought that a candidate has a right to run for office and at the same time avoid all personal sacrifice," App. 22a–23a, the body of first amendment law denies to government the ability to impose that sacrifice absent a compelling justification. Here, no such justification has ever been suggested.

Even if the *Red Lion* standard supporting broadcast regulations is upheld, the government's burden will not have been met. *Red Lion* is not predicated on a compelling state interest. Nor does the lower court's citation of Hatch Act cases fulfill the necessary burden. While this Court has recognized a compelling interest in precluding political participation by federal officeholders in order to prevent corruption, *see, e.g., United States Civil Serv. Comm'n. v. National Ass'n. of Letter Carriers*, 413 U.S. 548 (1973), such conclusions are not generalizable. See *Magil v. Lynch*, 560 F.2d 22, 27 (1st Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978) (The "government's interest in regulating both the conduct and speech of its employees differs significantly from its interest in regulating those of the citizenry in general.").

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

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APPENDICES

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1256

WILLIAM H. BRANCH, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN LEGAL FOUNDATION, CONSUMER FEDERATION OF AMERICA, et al., INTERVENORS

Petition for Review of an Order of the Federal Communications Commission

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Argued December 10, 1986

Decided July 21, 1987

Robert L. Corn, with whom *Marvin J. Diamond* was on the brief for petitioner.

C. Grey Pash, Jr., Counsel, Federal Communications Commission, with whom *Jack D. Smith*, General Counsel,

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, and *John J. Powers, III*, Attorney, Department of Justice, were on the brief for respondents. *George Edelstein*, Attorney, Department of Justice, entered an appearance for respondent.

David W. Danner, with whom *Andrew Jay Schwartzman* was on the brief for intervenor, Consumer Federation of America, et al. *Robert M. Gurss* entered an appearance for intervenor.

Michael P. McDonald was on the brief for intervenor, American Legal Foundation.

David M. Hunsaker was on the brief for *amicus curiae*, The Freedom of Expression Foundation, urging the Court to find section 315 as unconstitutional.

Jane E. Kirtley and *Elaine P. English* were on the brief for *amicus curiae*, The Reporters Committee for Freedom of the Press, urging the reversal of the Federal Communications Commission's decision in this case.

Before: BORK and STARR, *Circuit Judges*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* BORK.

Concurring opinion filed by *Circuit Judge* STARR.

BORK, *Circuit Judge*: A television news reporter who wishes to run for public office challenges the Federal Communications Commission's decision that the station which employs him would be required to provide "equal time" to his political opponents. This decision would require the station to offer his opponents opportunities to appear on the station that are equivalent to the newscaster's regular daily appearances. The Commission's determination rested on a federal statute. The reporter challenges both the interpretation of the statute and its constitutionality. We deny the petition for review.

I.

The petitioner, William Branch, is a television reporter who covers general assignments for station KOVR in Sacramento, California. He appears on the air in newscasts, on average, about three minutes per day, reporting stories assigned to him by the station. Branch lives in nearby Loomis, California, a small community of about 4,000 people. Beginning late in 1982, he participated in a successful effort to incorporate Loomis as a town. In 1984 Branch decided to seek election to the new Loomis town council.

Branch was aware that a federal statute—47 U.S.C. § 315(a) (1982)—imposes certain "equal time" burdens on broadcasters. He therefore consulted with station management for advice before commencing his campaign. The KOVR news editors calculated that the station would be required to provide thirty-three hours—or about one and a half broadcast days—of response time to Branch's opponents if he continued to work there during his campaign.[1] They told Branch that KOVR was unwilling to provide that amount of time to his opponents, and that if he wished to maintain his candidacy he must take an unpaid leave of absence during the campaign, with no guarantee that he would be able to resume his duties after the election.

Branch immediately sought judicial and administrative determination of his rights, but was unable to get a ruling before the 1984 election. Put to a choice, he continued his work at KOVR and dropped out of the town council race. Upon terminating his candidacy, however, he filed a petition for a declaratory ruling from the Commission on the effect of the "equal opportunities" re-

[1] This figure, which is not in dispute, was reached by multiplying 11 (the number of Branch's opponents) times 60 days (the approximate number of days in the campaign) times three minutes per day (the approximate number of minutes per day that Branch is on the air).

quirement in 47 U.S.C. § 315(a) on newscaster candidates. Branch sought a ruling that would enable him to run for the Loomis town council in a future election without requiring his employer to offer equal time to his opponents. He specifically asked the Commission to rule on two issues: whether the statute required broadcast stations to provide equal time to the opponents of newscaster candidates; and whether the statute was constitutional as so applied.

The Commission denied the petition. After reviewing the language and purposes of the statute, as well as its legislative history, the Commission concluded that newscaster candidates do not come within any special exemption from a station's statutory obligation to provide equal time to other candidates. *In re William H. Branch*, 101 F.C.C.2d 901, 902-04, 906 (1985). The Commission initially refused to review its previous determinations that section 315 is constitutional, mindful "that such constitutional decisions have 'generally been thought beyond the jurisdiction of administrative agencies.'" *Id.* at 904 n.4 (quoting *Oestereich* v. *Selective Serv. Bd.*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring)). The Commission went on, however, to state that it would defer to Congress' determination "in enacting section 315 that there is a governmental interest in assuring that licensees afford equitable treatment to all candidates running for a particular office, and that this interest justifies imposing certain limitations on broadcast speech. . . . [that treat] all candidates for public office . . . in the same manner." *Id.* at 904-05. The Commission also ruled that the statute is not unconstitutionally overbroad. *Id.* at 905. Branch's petition for reconsideration was denied by the Commission, and he now seeks review in this court.

II.

The government contends that Branch lacks standing to bring this suit in federal court. In order to establish standing, Branch must allege "personal injury fairly

traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). The government correctly notes that these standards remain applicable where the relief sought is merely a declaratory ruling, *see Radiofone, Inc.* v. *FCC*, 759 F.2d 936, 938-39 (D.C. Cir. 1985), and that the standards are unaffected by the fact that the petitioner was permitted to proceed before the administrative agency, which is not subject to the same jurisdictional limits that article III imposes on the federal courts. *See California Ass'n of the Physically Handicapped* v. *FCC*, 778 F.2d 823, 826 n.8 (D.C. Cir. 1985).

The crucial question is whether Branch has suffered any actual or threatened injury. The government concedes that if Branch could demonstrate that he was likely to lose his job, even temporarily, as a result of becoming a political candidate, he would have standing to seek review of the Commission's decision. Brief for Respondents at 10. Such an injury would be "distinct and palpable," *see Warth* v. *Seldin*, 422 U.S. 490, 501 (1975), and the direct threat of this injury would not vanish merely because in the previous election Branch chose to keep his job and forgo his candidacy. At that point, indeed, the alleged injury to Branch simply changed form, possibly becoming even more severe, for "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373-74 (1976).

Branch has adequately demonstrated that he suffered the particular injury just described. In an affidavit attached to his petition for reconsideration of the Commission's decision, Branch affirmed that after he decided to run for town council, he

> consulted with station management for advice. KOVR news editors told [Branch] that he must take an unpaid leave of absence during the campaign with

> no guarantee of resuming his duties after the election if he were to maintain his candidacy, because of the significant amounts of time that would have to be provided for opponents of a newscaster candidate under the Commission's section 315 rulings. [Branch] declined to run for town council because of this response.

Petition for Reconsideration at 3-4, Joint Appendix ("J.A.") at 83-84; Affidavit of William H. Branch at 1 (Sept. 10, 1985), J.A. at 106. This statement was subsequently confirmed in an affidavit filed with the court by Albert Jaffee, the news director at KOVR. Affidavit of Albert Jaffee at 1-2 (Dec. 12, 1986). These statements are sufficient to establish both that Branch's injury was caused by the Commission's view of the operation of the statute and that it is likely to be redressed by a favorable ruling on his petition. In addition, Branch correctly alleges that the Commission's ruling has a continuing impact on his ability to run for the Loomis town council in a future election. *See* Petition for a Declaratory Ruling *In re William H. Branch*, at 1 (Aug. 30, 1984), J.A. at 28. We therefore hold that Branch has standing to bring this case.

One of the intervenors recasts these objections as an argument that the case is not ripe for decision. The contention seems to be that Branch's claim would become ripe if he actually lost his job by prosecuting a campaign. This is, of course, merely a modified version of the argument that Branch has suffered no injury. It flies in the face of considerable precedent that a federal court may decide not only claims involving actual present injury, but also those involving a threat of injury which is sufficiently direct and immediate to constitute more than a string of contingencies or speculative characterizations. *See, e.g., Ex parte Levitt*, 302 U.S. 633, 634 (1937); *Steffel* v. *Thompson*, 415 U.S. 452, 459 (1974); *Laird* v. *Tatum*, 408 U.S. 1, 11-13 (1972). We also conclude that this case is ripe under the test set out in *Abbott Lab-*

oratories, Inc. v. *Gardner*, 387 U.S. 136, 149 (1967), which balances the fitness of the issues for resolution against the hardship done to the parties if the court withholds consideration. This case is fit for resolution; we do not believe the issues would be refined by any further development of these facts. On the other hand, the hardship Branch would suffer if we refused to hear his claim, which is the injury we have just described, is obvious.[2]

III.

Branch initially contends that the statute's "equal time" provisions do not apply to him because the statute exempts the television appearances of a newscaster candidate from their coverage. In matters of statutory construction, we "employ[] traditional tools of statutory construction," and "[i]f the intent of Congress is clear, that is the end of the matter." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 & n.9 (1984). The statutory language at issue reads in full:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other candidates for the office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provision of this section. No obligation is hereby imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

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[2] We also note in passing that this case is not moot, even though the 1984 town council election has long passed, since Branch seeks to preserve his right to run in a future election by preventing a recurrence of these events. Controversies that arise in election campaigns are unquestionably among those saved from mootness under the exception for matters "capable of repetition, yet evading review." *See, e.g.*, Moore v. Ogilvie, 394 U.S. 814, 816 (1969).

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newcasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

47 U.S.C. § 315(a) (1982). Branch reads the statutory language to mean: the "equal opportunities" requirement applies only when there is a "use" of a broadcasting station; a candidate's appearance on a bona fide newscast does not constitute such a "use"; thus Branch's appearances on KOVR's bona fide news broadcasts are not subject to the "equal opportunities" requirement. The apparent simplicity of this argument, however, is misleading.

The statutory language just quoted comprises four sentences. The first two, which contain Congress' statement of the equal opportunities rule, have been in effect since 1927, about as long as the broadcasting industry has existed in this country. *See* Radio Act of 1927, § 18, 44 Stat. 1162, 1170. For thirty-two years, these sentences stood alone as Congress' entire treatment of the issue. During that period, the Commission interpreted the statute to require "equal opportunities" whenever any

candidate appeared on the air, unless the candidate was the subject of "a routine news broadcast." *In re Allen H. Blondy*, 40 F.C.C. 284, 285 (1957); *see* Use of Broadcast Facilities by Candidates for Public Office, 23 Fed. Reg. 7817, 7817-18 (1958) (codifying the Commission's determinations of what constitutes a "use").[3] The news broadcast exception that the Commission formulated was understood as preserving for the station "the exercise of

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[3] Among the Commission's prior determinations, which it set out in a question-and-answer format, were the following:

> 4. Q. If a legally qualified candidate secures air time but does not discuss matters directly related to his candidacy, is this a use of facilities under section 315?
>
> A. Yes. Section 315 does not distinguish between the uses of broadcast time by a candidate, and the licensee is not authorized to pass on requests for time by opposing candidates on the basis of the licensee's evaluation of whether the original use was or was not in aid of a candidacy.
>
> . . . .
>
> 6. Q. If a candidate appears on a variety program for a very brief bow or statement, are his opponents entitled to "equal opportunities" on the basis of this brief appearance?
>
> A. Yes. All appearances of a candidate, no matter how brief or perfunctory, are a "use" of a station's facilities within section 315.
>
> . . . .
>
> 11. Q. If a station owner, or a station advertiser, *or a person regularly employed as a station announcer were to make any appearances over a station after having qualified as a candidate for public office, would section 315 apply*?
>
> A. *Yes. Such appearances of a candidate are a "use" under section 315.*

23 Fed. Reg. at 7818 (emphasis added). On the last answer, the Commission cited its earlier ruling that found the work done by a radio announcer to be a "use." *See* In re Kenneth E. Spengler, 14 Rad. Reg. (P & F) 1226b (1957). The Commission also noted its decision in *Blondy*, 23 Fed. Reg. at 7818.

its judgment as to newsworthy events." 23 Fed. Reg. at 7818.

Branch does not deny that his on-the-air work as a news reporter would be classified as a "use" if we looked solely at the first two sentences of section 315. His statutory argument rests instead on the third sentence.[4]

Congress added that sentence as well as the fourth to section 315 in 1959. The impetus for the addition was the response to the Commission's ruling in the "Lar Daly" case. *In re Telegram to CBS, Inc.*, 18 Rad. Reg. (P & F) 238 (1959). Lar Daly, a candidate for mayor of Chicago, complained to the Commission about television newscasts that had shown, among other things, interviews of his opponents and a film clip of the incumbent mayor greeting the Argentinean President at the airport. The Commission held that a candidate's appearance on a newscast constituted a "use" of a broadcasting station, and that Daly was entitled to equal time. *Id.* This decision, which upset the Commission's previous balance between a broad definition of the term "use" and freedom for broadcast stations to judge for themselves

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[4] In a 1965 decision, for example, the Commission explicitly construed the structure of the full text of amended section 315 in this same manner:

> Prior to the amendment to Section 315 in 1959, the Commission held that generally any appearance[s] of a person regularly employed as a station announcer after having qualified as a candidate for public office were "uses" of the station facilities within the meaning of Section 315. There has been no showing that this general line of rulings would be inapplicable to this situation (where the newscaster was identified up to the date of his candidacy, and prepares and broadcasts the news, including that of a local nature). The critical consideration is whether the 1959 amendment to Section 315 is applicable and calls for a different result.

Use of Station by Newscaster Candidate, 40 F.C.C. 433, 433 (1965).

which events merit news coverage, was severely criticized. On rehearing, the Commission frankly recognized that the ruling was troublesome, yet thought itself bound to uphold it:

> It may, of course, seem that such a holding is harsh or unduly rigid and that within the area of political broadcasts, it has a tendency to restrict radio and television licensees in their treatment of campaign affairs. If this be so, the short answer is that such a result follows not from any lack of sympathy on our part for the problems faced by licensees in complying with section 315, but from the unconditional nature of the language of section 315, which we are not at liberty to ignore.

In re CBS, Inc., 26 F.C.C. 715, 743 (1959).[5]

Congress immediately decided to "write back into Section 315 this traditional exemption from the equal-time requirement and to deal with other things that have always been thought to be exempted from the equal-time requirement." 105 Cong. Rec. 16,229 (1959) (Rep. Harris). Within three months the last two sentences of section 315 were enacted. *See* Communications Act Amendments of 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557, 557.

The legislative history of the 1959 amendments conclusively establishes three critical and overlapping points. First, Congress' central concern in taking action was to overrule the Commission's *Lar Daly* decision. *E.g.*, S. Rep. No. 562, 86th Cong., 1st Sess. 2-10 (1959); *id.* at 14 (additional views of Sen. Hartke) ("All of us agree

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[5] While acknowledging that "news presentation by radio and television stations is of inestimable value to the public interest," the Commission reaffirmed that "when a station uses film clips showing a candidate during the course of a newscast, that appearance of a candidate can reasonably be said to be a use within the meaning and intent of section 315." 26 F.C.C. at 742-43.

on the importance of reporting a bill to reverse the *Lar Daly* decision."); H.R. Rep. No. 802, 86th Cong., 1st Sess. 2-4 (1959); *id.* at 18 (supplemental views of Reps. Mack & Hemphill) ("This legislation is a result of the clamor which followed that decision.").[6] This concern was so important and so immediate that Congress was unwilling even to wait for that decision to be considered by the courts on appeal. *See, e.g.*, H.R. Rep. No. 802, *supra*, at 4; 105 Cong. Rec. 16,230 (1959) (Reps. Harris & Pucinski); *id.* at 16,236 (Rep. Flynt).

Second, the purpose of overruling *Lar Daly* was to restore the understanding of the law that had prevailed previously. *E.g.*, S. Rep. No. 562, *supra*, at 2-6, 17-19; H.R. Rep. No. 802, *supra*, at 2-3.[7] That understanding,

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[6] *See* 105 Cong. Rec. 14,440 (1959) (Sen. Pastore) ("We are merely writing into section 315 an exemption which will take care of the very ridiculous situation which is presented because of the Lar Daly decision."); *id.* at 14,450 (Sen. Engle) ("We propose to reverse the Daly case."); *id.* at 14,452 (Sen. Keating) (the amendments "attempt to remedy the rather ridiculous result achieved in the Lar Daly case"); *id.* at 16,224 (Rep. Budge) (this legislation "is most necessary" to correct "the impossible situation" created by *Lar Daly*); *id.* at 16,225 (Rep. Brown) ("This legislation has been drawn carefully . . . just to meet" the *Lar Daly* ruling that "just does not make good, common sense."); *id.* at 16,230 (Rep. Harris) ("the crucial thing in this legislation" is "to overrule the Lar Daly decision"); *see also id.* at 14,440 (Sen. Douglas); *id.* at 14,443 (Sen. Holland); *id.* at 14,445 (Sen. Case); *id.* at 14,446 (Sen. McNamara); *id.* at 14,453 (Sen. Javits); *id.* at 16,224 (Rep. Bolling); *id.* at 16,226 (Rep. Hoffman); *id.* at 16,228 (Rep. McCormack); *id.* at 16,232 (Rep. May); *id.* at 16,233 (Rep. Avery); *id.* at 16,234-35 (Rep. Rogers); *id.* at 16,237 (Rep. Jones); *id.* at 16,240 (Rep. Cunningham); *id.* at 16,241 (Rep. Bennett); *id.* at 16,244 (Rep. Quigley).

[7] *See* 105 Cong. Rec. 14,442 (1959) (Sen. Pastore) ("For almost 32 years we have lived in a situation in which the decision in the Daly case was not operative. But last February the Commission rendered a very ridiculous decision which

as we have noted, required "equal opportunities" whenever any candidate appeared on the air, unless the candidate was the subject of "a routine news broadcast." *See, e.g.*, 105 Cong. Rec. 14,454 (1959) (Sen. Pastore) ("The only trouble is that the Commission, which had sustained the position under the Blondy case, then last February under the Lar Daly case swung completely to the other side."); *id.* at 16,229 (Rep. Harris) ("primary purpose of this legislation" is to reverse *Lar Daly* and restore *Blondy* and "this traditional exemption from the equal-time requirement"); *id.* at 16,235-36 (Rep. Rogers) (*Daly* is inconsistent with *Blondy*, which was "a realistic and practical result in the public interest").

Third, Congress objected to the imposition of "equal opportunities" obligations on any station that carried news coverage of a candidate, because it deterred the broadcast media from providing the public with full coverage of political news events, and many other news

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requires that an amendment be made to the law."); *id.* at 14,450 (Sen. Engle) ("[W]e have had something like 32 years of experience with the law, and we have had no trouble with it at all. . . . It was not until February of this year, when the FCC issued its stupid, silly decision in the Lar Daly case, that we were confronted with any trouble."); *id.* at 14,455 (Sen. Pastore) ("Generally all we are doing is restoring the situation insofar as news is concerned to that which existed for 32 years, before the Lar Daly decision."); *id.* at 16,227 (Rep. Celler) (this bill "restores the status quo before the Lar Daly decision"); *id.* at 16,234 (Rep. Avery) (this bill restores "the end that is sought and was accepted in the industry before the Lar Daly decision"); *id.* at 16,236 (Rep. Mack) (the bill will "restore a situation which had existed since 1927 when the original act was passed"); *id.* at 16,237 (Rep. Harris) (the committee's intention was "to restore the original intent of the Congress and the original interpretation of this basic law"). A proposal was also made in the Senate to exempt candidate appearances on "panel discussions," which would have been a considerable shift from the state of the law before *Lar Daly*, but it was rejected. *See id.* at 14,450-53.

events as well. *E.g.*, S. Rep. No. 562, *supra*, at 9-10, 13, 14; H.R. Rep. No. 802, *supra*, at 4-5.[8] To the extent that Congress may have done more than reverse *Lar Daly*, by exempting broadcast coverage of news interviews and news documentaries in addition to newscasts and on-the-spot coverage of news events, it did so to protect a station's ability to exercise broad discretion in choosing which *newsworthy events* to present to the public. *E.g.*, S. Rep. No. 562, *supra*, at 10-11 (concern is about "news and information-type programs" that "serve to enlighten the public"); H.R. Rep. No. 802, *supra*, at 4-5 ("broadcasters must be given freedom to exercise their news judgment in permitting candidates to appear in newscasts" and showing candidates "involved in news events"); *id.* at 6 ("in order not to be considered use of a station, the event to be covered in a newscast must be news in and of itself").[9]

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[8] *See also, e.g.*, 105 Cong. Rec. 14,439 (1959) (Sen. Pastore) (the alternative to this bill is "a blackout in the presentation of legally qualified candidates in the news type programs"); *id.* at 14,446 (Sen. McNamara) (if *Lar Daly* stands, "effective radio and television news coverage of elections would be seriously jeopardized"); *id.* at 14,447 (Sen. Hartke) ("The ruling severely restricts the opportunity of the people to know what is going on."); *id.* at 14,451 (Sen. Holland) (these amendments allow broadcasters "to cover the political news to the fullest degree"); *id.* at 16,226 (Rep. Celler) ("The overriding consideration in these circumstances is that passage of the pending measure is urgently needed to protect the public's right to know."); *id.* at 16,240 (Rep. Cunningham) (*Lar Daly* placed "a news gag . . . on the entire broadcasting industry"); *id.* at 16,242 (Rep. Stratton) ("without the kind of clarification provided in this legislation fair and adequate coverage of the news may be seriously impaired"); *id.* at 16,246 (Rep. McGovern) ("as matters now stand, it will be virtually impossible for radio and television stations to offer adequate news coverage").

[9] *See also, e.g.*, 105 Cong. Rec. 14,443 (1959) (Sen. Holland) (the proposed exemption is confined to "a field of items which are either newsworthy or are so close to news as to be prop-

Thus Congress' intent in enacting the amended section 315 is readily discernible. "Appearance by a legally qualified candidate," which is not "deemed to be use of a broadcasting station," is coverage of the candidate that is presented to the public as news. The "appearance" of the candidate is itself expected to be the newsworthy item that activates the exemption. "By modifying all four categories [not deemed to be 'use' with the phrase 'bona fide,' Congress plainly emphasized its reliance on newsworthiness as the basis for an exemption." *Office of Communication of the United Church of Christ* v. *FCC*, 590 F.2d 1062, 1065 (D.C. Cir. 1978).

The thrust of the language is brought out further in the third and fourth specific exemptions. The "news

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erly excepted"); *id.* at 14,446 (Sen. McNamara) (the amendments leave "the control of news coverage of politics in the hands of the broadcasters"); *id.* at 14,450 (Sen. Engle) (A candidate "is entitled to appear on television" if his action "is a newsworthy event. . . . News is a self-limiting factor."); *id.* at 16,225 (Rep. Brown) (amendments apply to a candidate who is the subject of coverage "where it is legitimate news, or the coverage of a legitimate news event"); *id.* at 16,227 (Rep. Celler) (this bill safeguards "the right of the American citizenry to obtain at first hand newsworthy events treated in political campaigns"); *id.* at 16,236 (Rep. MacDonald) (The *Daly* ruling "destroys the program editor's freedom of judgment as to what is news and what is not. Newscasters should not be restrained against the public interest in proper judgment of what is news."); *id.* at 16,244 (Rep. Moss) ("a news development . . . showing the candidate making his newsworthy statement" would be exempt).

Some Representatives and Senators were concerned, however, that a station's broad discretion in choosing which news events to present could allow favoritism and discrimination in portraying candidates. This concern was addressed by continued recognition in the fourth sentence of § 315 that broadcasters operate in the public interest, a broad obligation that the Commission enforces more specifically. *See* Telecommunications Research & Action Center v. FCC, 801 F.2d 501 (D.C. Cir.), *reh'g denied*, 806 F.2d 1115 (1986).

documentary" exemption applies only "if the appearance of the candidate is incidental to *the presentation of the subject or subjects covered by the news documentary.*" 47 U.S.C. § 315(a)(3) (1982) (emphasis added). This passage relates the candidate's appearance to the subjects covered in the program. If the candidate's appearance has nothing to do with the subjects that are being covered as news—whether because the candidate is a regular employee on all such programs or, to take another example, because the candidate is being offered a gratuitous appearance that realistically is unrelated to the news content of the program—then the exemption does not apply. Similarly, the fourth exemption for "on-the-spot coverage" of news applies only to "coverage of bona fide news events." *Id.* § 315(a)(4). Here again the focus is on a news *event* that is being covered, with the candidate's appearance expected to occur as part of the event *being covered.*

When a broadcaster's employees are sent out to cover a news story involving other persons, therefore, the "bona fide news event" is the activity engaged in by those other persons, not the work done by the employees covering the event. The work done by the broadcaster's employees is not a part of the event, for the event would occur without them and they serve only to communicate it to the public. For example, when a broadcaster's employees are sent out to cover a fire, the fire is the "bona fide news" event and the reporter does not become a part of that event merely by reporting it. There is nothing at all "newsworthy" about the work being done by the broadcaster's own employees, regardless of whether any of those employees happens also to be a candidate for public office.

This reading of the statute as not exempting newscasters is also compelled by the weight of the legislative history. As we have said, Congress' intent in the 1959 amendments was to return the industry to the situation that had prevailed before *Lar Daly.* The status quo be-

fore *Lar Daly* allowed a candidate to appear on the air as the *subject* of "routine" news coverage without triggering the "equal opportunities" rule, *see Blondy*, 40 F.C.C. at 285, but did not exempt appearances by a candidate who is "regularly employed as a station announcer." *See* 23 Fed. Reg. at 7818; *In re Kenneth E. Spengler*, 14 Rad. Reg. (P & F) 1226b (1957). Nowhere in the legislative history is there the slightest indication that Congress intended, for the first time, to sweep the latter class of appearances within the scope of the exemption.

Moreover, Congress' objection to *Lar Daly* was that it discouraged wide broadcast coverage of political news events by restricting a station's ability to determine which news *events* to present to the public. Congress solved this problem by exempting any on-air appearance by a candidate who is the *subject* of news coverage. It is irrelevant to that problem whether a station has broad discretion to determine which of its employees will actually present the news on the air. That issue may raise very different problems, which we will consider later,[10] but it did not arise at all in Congress' debates on the 1959 amendments. On the contrary, considerable concern was voted about the possibility that "sham" news events —events that are not bona fide news but are staged by the candidate—might be seen as exempt from the "equal opportunities" rule. *See, e.g.*, H.R. Rep. No. 802, *supra*, at 6; 105 Cong. Rec. 14,462 (1959) (Sen. Long) (the amendments apply to a candidate "when he was making news"); *id.* at 16,236 (Rep. MacDonald) ("staged events . . . should not be viewed as news"). This possibility was eventually foreclosed, however, by the wording of the fourth exemption. In denying any exemption for candidate appearances through "sham" news events, Congress once again expressed its view that exemption should be made only for on-air appearances that are intrinsically

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[10] *See infra* section IVC.

newsworthy. At all times, the focus was not on preserving anyone's "right" to appear on the air, but on preserving broadcasters' ability to present to the public certain kinds of news programs and news events.[11]

In opposition to that consistent approach, Branch asks this court to read the phrase "[a]ppearance by a legally qualified candidate on any [news program]" as exempting from the "equal opportunities" rule all on-air work done by newscaster candidates. We cannot do so. As we have already noted, such a reading would be at odds with the law before *Lar Daly*, which Congress explicitly sought to restore through the 1959 amendments. In addition, this reading would raise a station's news employees to an elevated status not shared by any of its other employees: although the work done on the air by any other employee on any other program would not be exempt, *see, e.g., Paulsen* v. *FCC*, 491 F.2d 887 (9th Cir. 1974), the work done on the air by news employees would be. Yet this novel division was never endorsed, or even discussed, by Congress.

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[11] The Commission's subsequent interpretations of § 315 to allow an exemption from the "equal opportunities" rule for coverage of candidates in debates initiated by non-broadcasters, *see* In re Aspen Inst., 55 F.C.C.2d 697 (1975), *aff'd sub nom.* Chisholm v. FCC, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976), in delayed broadcasts of political events, *see* In re Delaware Broadcasting Co., 60 F.C.C.2d 1030 (1976), *aff'd sub nom.* Office of Communication of the United Church of Christ v. FCC, 590 F.2d 1062 (D.C. Cir. 1978), and in debates initiated by broadcasters, *see* In re Henry Geller, 95 F.C.C.2d 1236 (1983), *aff'd mem. sub nom.* League of Women Voters Educ. Fund v. FCC, 731 F.2d 995 (D.C. Cir. 1984), are harmonious with Congress' intent to ensure that the public will have access to a broad array of newsworthy events. But none of these interpretations can be used to justify an exemption for newscaster candidates who are not the subjects of news coverage during their time on the air.

Finally, Branch argues that the Commission's position in this case is inconsistent with the position it took in a 1960 ruling, which was upheld on appeal. *See In re KWTX*, 40 F.C.C. 304, *aff'd sub nom. Brigham* v. *FCC*, 276 F.2d 828 (5th Cir. 1960) (per curiam). We think, however, that these decisions were wrong, and do not reflect a proper interpretation of section 315. In *KWTX*, the Commission held that the "equal opportunities" rule was not applicable to the on-air appearances of a weatherman. *See* 40 F.C.C. at 304-05. In its ruling, however, the Commission merely stated this conclusion without providing any analysis of the statutory language or any mention of the legislative history. The Fifth Circuit's brief per curiam affirmance did set out the statutory language, but disposed of the issue in a single paragraph. *See* 276 F.2d at 830. It also did not mention the legislative history, but focused instead on the fact that no favoritism by the station had been shown. *See id.*

Five years later, however, the Commission revisited this issue. *See Use of Station by Newscaster Candidate*, 40 F.C.C. 433 (1965). The Commission stated: "In view of the frequency with which these situations have arisen, we have re-examined the question of the applicability here of the 1959 amendment, and have researched at length the legal and legislative history considerations." *Id.* at 434. Based on its more detailed consideration of the matter, the Commission reversed its position and concluded that the 1959 amendments did not apply to exempt newscaster candidates from the "equal opportunities" rule. Its stance has remained unchanged ever since that decision.

We agree, therefore, that the Commission has not always taken the same position on this issue. If the question for this court were how much deference to give to the Commission's views, this change of heart might offer slender support for Branch's position. *See, e.g., FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37

(1981). On the other side, of course, would be the more substantial facts that the Commission changed its position upon fuller consideration of the issue for a very good reason, and has faithfully adhered to its current position for more than twenty years. But in the first instance, always, the question for a court is not how much deference to give to an agency's interpretation of a statute, but whether that interpretation is correct. *See Chevron*, 467 U.S. at 843 & n.9, 845. On the issue of statutory construction raised here, we think the Commission's current position is correct, and Congress' intent is clear. The weight of the legislative history, indeed, is overwhelming. No tribunal that has considered the language of section 315 in light of its legislative history has ever endorsed Branch's reading of the statute, and we also reject it.[12]

IV.

We have determined that section 315 does not exempt newscaster candidates from the strictures of the "equal opportunities" rule. Branch challenges the statute, as so interpreted, on several constitutional grounds. Common to all of the challenges is Branch's assertion that the Commission acted arbitrarily and capriciously by initially refusing "to undertake a review here of previous determinations as to the constitutionality of section 315." *Branch*, 101 F.C.C.2d at 904 n.4. The Commission did not err in taking this position, for although an administrative agency may be influenced by constitutional con-

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[12] In light of Judge Starr's concurrence, we wish to specify one point. We do not believe that the language of the statute, taken alone, is unambiguous on this issue. We do believe, however, that when we "employ[] traditional tools of statutory construction," and inform our reading of the statute by an examination of its legislative history, "the intent of Congress is clear." *Chevron*, 467 U.S. at 843-44 & n.9. We therefore do not continue on to consider the reasonableness of the agency's position. *See id.* at 844 n.9 ("If the intent of Congress is clear, that is the end of the matter.").

siderations in the way it interprets or applies statutes, it does not have jurisdiction to declare statutes unconstitutional. *See, e.g., Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); *Johnson* v. *Robison*, 415 U.S. 361, 368 (1974); *Public Utils. Comm'n* v. *United States*, 355 U.S. 534, 539 (1958). In addition, the Commission did consider Branch's constitutional arguments insofar as they had a bearing on its own interpretation and application of section 315. *See Branch*, 101 F.C.C.2d at 904-05. We think this approach was entirely proper,[13] and we turn now to Branch's substantive challenges to the constitutionality of section 315.

A.

Branch's first objection is that the statute extinguishes his right to seek political office. That he has such a right is undeniable, though the Constitution and the Supreme Court's cases in the area do not pinpoint the precise grounds on which it rests. *See, e.g., Jenness* v. *Fortson*, 403 U.S. 431, 438-40 (1971); *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974); *Bullock* v. *Carter*, 405 U.S. 134, 142-43 (1972); *cf. Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968).[14] But whatever its source,

[13] This court's recent decision in Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987), a challenge to the constitutionality of continued enforcement of the Commission's fairness doctrine, bears out the soundness of the Commission's approach here. In *Meredith*, we reversed the Commission because it had refused to consider constitutional issues that were raised as a defense to an enforcement proceeding. But we specifically recognized that although the Commission may be influenced by constitutional considerations in the way it interprets and applies statutes, it is "not free to declare an act of Congress unconstitutional," *id.* at 872, and we cautioned that "[i]f the Commission had concluded that the [fairness] doctrine was congressionally mandated and properly applied to Meredith, it would, as we have indicated, not have been obliged to reach the constitutional question." *Id.* at 873 n.11.

[14] Other cases cited by the petitioner do not concern a right to run for political office, but instead the right to be free from

the right is not implicated in this case. "In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Bullock*, 405 U.S. at 143. Here that impact is slight. The "equal opportunities" rule does not extinguish anyone's right to run for office. It simply provides that certain uses of a broadcast station by a candidate entitle other candidates for the same office to equal time. That the rule will affect some candidates favorably and others unfavorably is obvious. It may cause certain candidates to receive less time on the air than if the statute did not exist. But the Supreme Court has held that no individual has any right of access to the broadcast media. *Columbia Broadcasting System, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94 (1973). "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

The core of Branch's challenge on this point is that the statute imposes an undue burden on his ability to run for office because he cannot, during the time he is a candidate, do his normal work of reporting news on the air for station KOVR. But nobody has ever thought that a candidate has a right to run for office and at the same time to avoid all personal sacrifice. *See United States*

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government action that violates other express constitutional restrictions. The Supreme Court has recognized that American citizens "do have a federal constitutional right to be considered for public service without the burden of discriminatory disqualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees." Turner v. Fouche, 396 U.S. 346, 362-63 (1970) (footnotes omitted). *See also* McDaniel v. Paty, 435 U.S. 618 (1978) (restriction on political activity of ministers violates free exercise of religion); Torcaso v. Watkins, 367 U.S. 488 (1961) (religious oath test for political office violates free exercise clause).

Civil Serv. Comm'n v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 567 (1973) ("Neither the right to associate nor the right to participate in political activities is absolute in any event."). Even if the practicalities of campaigning for office are put to one side, many people find it necessary to choose between their jobs and their candidacies. The Hatch Act requires government employees to resign from work if they wish to run for certain political offices, *see* 5 U.S.C. §§ 7324-7327 (1982), and involves many more intrusive restrictions as well, yet the Supreme Court has upheld it against constitutional challenge. *See Letter Carriers*, 413 U.S. 548; *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947). More recently, the Court upheld a Texas law that required certain public officials to resign from office if they wished to become candidates for certain other offices. *Clements* v. *Fashing*, 457 U.S. 957 (1982).

Indeed, the burdens Branch complains of are borne by all other radio and television personalities under section 315, though the exception he seeks would apply only to newscasters. In *Paulsen* v. *FCC*, 491 F.2d 887 (9th Cir. 1974), those burdens were upheld against essentially the same objection made here. The petitioner, a television performer who had announced his candidacy for President, contended that section 315 "forces him to give up his means of livelihood as a television performer in order to run for office." *Id.* at 891-92. In *Paulsen* the challenge was clothed in an equal protection guise, and perhaps at bottom Branch's challenge is also one of equal protection. However that may be, the argument is the same, and so is the result. Under established law, *Paulsen* was correct in finding the burdens imposed by section 315 justifiable as "both reasonable and necessary to achieve the important and legitimate objectives of encouraging political discussion and preventing unfair and unequal use of the broadcast media." *Id.* at 892.

B.

Branch's second constitutional objection to section 315 is that the "equal opportunities" rule violates the first amendment. He cites *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), where the Supreme Court unanimously struck down a Florida law that gave political candidates a right to reply to criticisms and attacks published in newspapers. The Court held that the law compelled editors or publishers to publish material against their will, thus exacting an unconstitutional "penalty on the basis of the content of a newspaper." *Id.* at 256. The Court broadly declared that a "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" *Id.* at 257 (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964)). The "equal opportunities" rule, in Branch's view, is identical to a right-of-reply statute in its impact.

The Supreme Court has expressly held, however, that the first amendment's protections for the press do not apply as powerfully to the broadcast media. In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), the Court upheld the government's authority "to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Id.* at 390. What makes the broadcast medium unique, in the Court's view, is the scarcity of broadcast frequencies. *Id.* at 389-90.

While doubts have been expressed that the scarcity rationale is adequate to support differing degrees of first amendment protection for the print and electronic media, *see, e.g., Telecommunications Research & Action Center* v. *FCC*, 801 F.2d 501, 506-09 (D.C. Cir.), *reh'g denied*, 806 F.2d 1115 (1986); *Meredith Corp.* v. *FCC*, 809 F.2d 863, 866-67 (D.C. Cir. 1987), it remains true, nonetheless, that Branch's first amendment challenge is squarely foreclosed by *Red Lion*. In *Red Lion*, the Supreme Court upheld as constitutional the Commission's authority to enforce the fairness doctrine, which requires broadcast

stations to give fair coverage to each side of a public issue, and in particular upheld "its specific manifestations in the personal attack and political editorial rules." 395 U.S. at 386. In the course of its opinion, the Court held that the statutory "equal opportunities" rule in section 315 and the Commission's own fairness doctrine rested on the same constitutional basis of the government's power to regulate "a scarce resource which the Government has denied others the right to use":

> In terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial rules are indistinguishable from the equal-time provision of § 315, a specific enactment of Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements. That provision, which has been part of the law since 1927, Radio Act of 1927, § 18, 44 Stat. 1170, has been held valid by this Court as an obligation of the licensee relieving him of any power in any way to prevent or censor the broadcast, and thus insulating him from liability for defamation. The constitutionality of the statute under the First Amendment was unquestioned. *Farmers Educ. & Coop. Union* v. *WDAY*, 360 U.S. 525 (1959).

Id. at 391 (footnote omitted). *Red Lion* thus compels us to reject Branch's first amendment claim.

Nor can we adopt Branch's suggestion that this court would be justified in stepping away from *Red Lion*. The Supreme Court recently reaffirmed *Red Lion* and disavowed any intention "to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 376 n.11 (1984). The Commission may now have sent just such a signal by issuing a report

which concludes that section 315 is unconstitutional and should be abandoned. *See General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985).[15] But unless the Court itself were to overrule *Red Lion*, we remain bound by it.

C.

Branch's final constitutional challenge to section 315 is that it impermissibly limits the discretion of broadcast stations to select the particular people who will present news on the air to the public. Branch thus attempts to press the third-party rights of broadcasters who are not themselves parties to this case. Although the general rule is that a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties," *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975), the Supreme Court has also stated that "[w]ithin the context of the First Amendment, the Court has enunciated . . . concerns that justify a lessening of prudential limitations on standing." *Secretary of State* v. *J.H. Munson Co.*, 467 U.S. 947, 956 (1984); *see also Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

Here, as in *Munson*, the "activity sought to be protected is at the heart of the business relationship between"

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[15] In its report, the Commission found that "the various print and electronic media exist in a widely diverse and competitive information marketplace." *See General Fairness Doctrine Obligations*, 102 F.C.C.2d at 202; *see also id.* at 198-202. It also exhaustively canvassed the significant and growing contributions to this market of cable television, low power television multichannel multipoint distribution service, video cassette recorder, satellite master antennae systems, and other electronic media, including recent advancements in satellite technology. *See id.* at 208-17. When all of these technologies are taken into account, "the overall number of broadcast frequencies exceeds the total number of daily newspapers in the United States." *Id.* at 217.

Branch and KOVR, and Branch's "interests in challenging the statute are completely consistent with the First Amendment interests of the [broadcasters he] represents." 467 U.S. at 958. It makes no difference that a broadcaster could bring this challenge in a separate suit. *Id.* at 957-58.

Nonetheless, the third-party challenge Branch advances is rebutted by *Red Lion.* A burden on the ability to present a particular broadcaster on the air, which applies to all broadcasters irrespective of the content of the news they present, is a much less significant burden than rules requiring the transmission of replies to personal attacks and political editorials, which were upheld in *Red Lion.* The latter provisions apply directly to political speech, and weigh more heavily on some messages than on others, depending on the precise content of the message conveyed. In contrast, the burdens on broadcasters that Branch asserts here do not "impair the discretion of broadcasters to present their views on any issue or to carry any particular type of programming." *Columbia Broadcasting System, Inc.* v. *FCC,* 453 U.S. 367, 396-97 (1981). Moreover, we note again that there is no right of any particular individual to appear on television. *See, e.g., Columbia Broadcasting System, Inc.* v. *Democratic Nat'l Comm.,* 412 U.S. 94, 113 (1973).

The petition for review is, therefore,

Denied.

STARR, *Circuit Judge*, concurring: Although I concur in the court's judgment and much of its thorough opinion, I write separately to express a different perspective about the case, and especially the extent to which the Federal Communications Commission's interpretation is mandated by the statute. Briefly stated, I believe the statute more naturally lends itself to petitioner's interpretation, but that Congressional intent is insufficiently clear to overturn the Commission's contrary reading.

The issue before us is the meaning of the "equal opportunities" requirement of section 315(a) of the Federal Communications Act, 47 U.S.C. § 315(a) (1982). As the court indicates, two of the four sentences of section 315(a) are of particular relevance here. The first sentence sets forth the "equal opportunities" requirement:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section.

Id. § 315(a). The third sentence then provides exemptions from the strictures mandated by the first sentence:

> Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

Id.

Section 315(a) is thus crystal clear: bona fide newscasts are exempt from its "equal opportunities" requirement. Since in this case there is no question but that Mr. Branch in reporting his three-minute news segments appears on a bona fide newscast, his appearance would not be deemed a use of a broadcasting station under a straightforward reading of section 315(a).

As the court acknowledges, the Fifth Circuit recognized the force of this common-sense interpretation in *Brigham v. FCC*, 276 F.2d 828 (5th Cir. 1960). In *Brigham*, the court upheld the Commission's determination (later repudiated, *see Use of Station by Newscaster Candidate*, 40 F.C.C. 433 (1965)) that a weathercaster's appearance fell within the "bona fide newscast" exemption of section 315(a)(1). The Fifth Circuit stated with admirable brevity:

> There is not the slightest hint in the undisputed facts that this weathercaster's appearance involved anything but a bona fide effort to present the news. . . . [H]is employment is not something arising out of the election campaign but, rather, is a "regular job." Certainly the facts do not indicate any favoritism on the part of the station licensee or intent to discriminate among candidates.

Brigham, 276 F.2d at 830.

Eschewing *Brigham*'s simplicity, the court examines in detail the legislative history of the 1959 amendments that created the section 315(a) exemptions. *Cf. Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, 107 S. Ct. 1855, 1859-60 (1987). After a careful evaluation of the legislative materials, the court quite rightly concludes that Congress, in enacting the exemp-

tions, intended to protect broadcast stations' discretion to air newsworthy events. *See* Panel Op. at 14.

From that unexceptionable premise, however, the court derives the general principle that Congress intended the exemption to extend only to "coverage of the candidate that is presented to the public as news." Panel Op. at 15. But there is a difficulty with this analysis. Through its finely-honed construction of the third sentence of the statute, the court moves rather far away from the key language of the first sentence of section 315(a), namely "permit" and "use." When a newscaster reports the news, there is no "use" or "permitting" of a use in the ordinary sense of those words. Employers do not "permit" their employees to "use" broadcast facilities. Employees are *hired* to do their jobs. Once on the payroll, they have to carry on their duties; there is no "permission" being granted in the everyday sense of the word. The thrust of the first sentence, in short, is to regulate broadcaster favoritism and candidate-initiated appearances, which is what *Brigham* held.

For these reasons, a more natural statutory interpretation would exempt newscast reporters who are just doing their jobs from the "equal opportunities" requirement of section 315(a). But, unfortunately for Mr. Branch, the most natural reading is not the only reading that will pass muster under governing principles of statutory construction. What is more, as the court faithfully recounts, the legislative history contains suggestions that Congress adopted the 1959 amendments in order to restore the understanding of the law that had prevailed prior to the Commission's ill-fated *Lar Daly* decision. *See id.* at 12-13 & n.7. Since that pre-*Lar Daly* body of law included the principle that a newscaster's appearance was indeed a "use" within section 315(a), *see* 23 Fed. Reg. 7817, 7818 (1958), it is not unfair to conclude that the legislative history adds an additional dash of

uncertainty in the search for Congress' intent. That Congressional intent is ambiguous is, of course, quite a different matter than concluding, as the court apparently does, that Congress clearly intended to exclude newscasters from the exemptions.

It is thus the ambiguity of the Legislature's intent, not the supposed crystalline clarity of the statute (and legislative history), that in my view carries the day for the Commission. Under *Chevron* principles, courts are, of course, bound to defer to an agency's reasonable interpretation of its governing statute if Congress' intent is unclear. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-44 (1984); *cf. INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1221-22 (1982). In light of the two permissible readings of the statute and the support that the Commission's interpretation enjoys in the legislative history, the court correctly holds that the Commission's "newscaster candidacy" rule passes muster under *Chevron*. At the same time, however, the Commission is, in my view, by no means bound to its current interpretation, which as I see it embodies the less natural and indeed less sensible reading of what Congress passed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
NO. 86-1256
SEPTEMBER TERM, 1986

William H. Branch,
Petitioner

v.

Federal Communications Commission and the
United States of America,
Respondents

American Legal Foundation,
Consumer Federation of America, et al.,
Intervenors

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Before: BORK and STARR, Circuit Judges,
and McGowan, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Federal Communications Commission, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the petition for review is hereby denied, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

George A. Fisher
Clerk

Date: July 21, 1987
Opinion for the Court filed by Circuit Judge Bork.
Concurring opinion filed by Circuit Judge Starr.

APPENDIX C

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request by	)
	)
William H. Branch	)
	)
for	)
	)
Declaratory Ruling	)

Memorandum Opinion and Order

Adopted: March 26, 1986;
Released: March 31, 1986;

By the Commission:

1. The Commission has before it a petition for reconsideration of its ruling of August 12, 1985,[1] in which we denied petitioner's request for a declaratory ruling that appearances by legally qualifed candidates for public office in their capacity as newscasters would no longer be subject to the "equal opportunities" required by Section 315 of the Communications Act of 1934, as amended.

2. In his petition, Mr. Branch reiterates his general challenge to Section 315's constitutionality and, more particularly, as applied by the Commission to newscaster-candidate appearances. Mr. Branch also contends that in denying his request the Commission has continued to misinterpret the legislative history of the news exemptions to Section 315 which, in his view, does not support application of Section 315 to newscaster

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[1] 101 FCC 2d 901. On September 23, 1985, the American Legal Foundation filed an opposition, to which Mr. Branch replied on September 30.

candidates during otherwise exempt news programming. Lastly, Mr. Branch continues to argue that his appearances will be limited to "nonpolitical" news material to avoid even that possibility that his campaign would be furthered. Mr. Branch adds that he exercises no control over the editorial content of the news he reports.

3. Petitioner has provided no basis for reconsideration of our decision. The legislative history of the Section 315 news exemptions indicates that Congress enacted them to enhance the unfettered news coverage of the political arena during campaign periods. In order to minimize any unfair advantage which could result from the amendment, Congress indicated that the exemptions would not apply where candidates initiated the coverage themselves or were in control of the production or format of the news. Despite Mr. Branch's argument that he does not editorially control the material, as a newscaster he is a part of the news production and delivery team. Furthermore, Congress believed that assuring relative equality of treatment for candidates outweighed the potential for intrusion upon journalistic discretion. Court precedent and previous Commission decisions support this interpretation of Section 315, including its applicability to candidate appearances irrespective of whether they are "political" or "nonpolitical" in nature.[2] The Commission correctly deferred any ultimate disposition of Mr. Branch's general constitutional challenge to Congress and the courts, the traditional forums for such determinations.

4. In view of the above, pursuant to Section 1.106 of the Commission's rules, the petition for reconsideration IS DENIED.

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[2] *Pat Paulsen*, 33 FCC 3d FCC 2d 297 (B/c Bur. 1972), *review denied*, 33 FCC 2d 835 (1972), *aff'd sub nom. Paulsen v. FCC*, 491 F.2d 887 (9th Cir. 1974). *See also Use of Station by Newscaster Candidate for Public Office*, 40 FCC 433 (1965), where the Commission by public notice first refused to exempt newscaster-candidate appearances.

APPENDIX D

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Request by	)
	)
William H. Branch	)
	)
for	)
	)
Declaratory Ruling	)

MEMORANDUM OPINION AND ORDER

Adopted : August 5, 1985; Released: August 12, 1985

BY THE COMMISSION: COMMISSIONERS RIVERA AND PATRICK CONCURRING IN THE RESULT.

1. The Commission has before it a request for a declaratory ruling involving Section 315(a) of the Communications Act of 1934, as amended, filed by William H. Branch.[1]

REQUEST

2. Branch states that he is a news reporter at television station KOVR, Stockton, California, and that he had intended to run in the November 1984 Loomis, California, town council election. Had Branch become a legally qualified candidate for public office during the general election and ontinued his on-the-air appearances, pursuant to the Commission's interpretation of Section 315, KOVR would have been required to provide "equal opportunities" to his opponents. KOVR informed Branch that it would not provide such time to his opponents. Instead, he would have been required to take a leave of absence for the duration of the campaign, with no

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[1] On August 10, 1984, Branch filed a request for an expedited declaratory ruling with respect to the issues raised herein. Shortly thereafter, he informed the Commission that an expedited ruling would not be necessary since he no longer intended to run as a candidate for the Loomis, California, town council. On August 30, 1984, a memorandum in support of the petition was filed by Michael A. Hackard on behalf of Branch. By letter, which the Commission received September 17, 1984, Branch requested that the Commission delay a decision in this matter until after the November 6 election.

On October 26, 1984, the National Association of Broadcasters (NAB) filed a statement in partial support of Branch's request, asking that the Commission seek public comment on this matter. Because the legislative, judicial, and Commission precedents are clear with respect to the issues raised herein, we do not feel public comment is necessary.

On October 29, 1984, the American Legal Foundation (ALF) filed an opposition to the Branch petition. The gravamen of ALF's arguments is that Branch's request would violate the basic congressional objective in enacting Section 315(a) of the Communications Act -- that is, to ensure that all candidates for public office are treated similarly in their use of broadcast facilities.

assurance of being rehired after the election. Branch requests that the Commission declare the "equal opportunities" provision of Section 315 to be unconstitutional. He also argues that the Commission's interpretation of Section 315 violates first amendment free speech objectives and is overbroad in its application. Branch asserts that the legislative history of the 1959 amendments clearly indicates that the Commission should modify its interpretation of Section 315 and exempt the appearances of a newscaster/candidate from the "equal opportunities" provision of Section 315.

DISCUSSION

A. CASE AND LEGISLATIVE HISTORY

3. Section 315(a) requires that if broadcasters permit a legally qualified candidate to "use"[2] their facilities, they must afford equal opportunities to the candidate's opponents. The purpose of Section 315, originally Section 18 of the Radio Act of 1927 (44 Stat 1162), is to assure equality of treatment to candidates for public office. 67 Cong. Rec. 12502 (1926); 105 Cong. Rec. 14439, 14451 (1959). In 1959, the Commission held that Section 315 required "equal opportunities" to be afforded to the opponents of those Chicago mayoral candidates who appeared on television newscasts. *Telegram to CBS, Inc.* (*Lar Daly*), 18 RR 238 (1959), *recon. denied*, 26 FCC 715 (1959). Congress reacted to that ruling by amending Section 315 to

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[2]In general, any appearance by a legally qualified candidate on a nonexempt program, by voice or picture, where the candidate's participation is such that he will be identified by members of the viewing or listening audience, constitutes, a "use." *Law of Political Broadcasting and Cablecasting*, -- FCC 2d -- 1984); H. R. 92-65, 92d Cong., lst Sess. 9 (1971).

exempt four categories of news programming.[3] The purpose of the amendement is set forth clearly in the Senate report, which states:

> If the present position of the Federal Communications Commission with regard to Section 315 remains unchanged, the Committee feels that this would tend to dry up meaningful radio and television coverage of political campaigns. [S. Rep. No. 562, 86th Cong., lst Sess. 10 (1959).]

The amendment created situations where broadcasters need not provide absolute equality of treatment to candidates appearing on exempt programs. In order to minimize any unfair advantage which could result from the amendement, Congress indicated that the exemptions would not apply where candidates initiated the coverage themselves. While discussing the proposed amendments on the Senate Floor, Senator Pastore chairman of the subcommittee which drafted the amendments, stated:

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[3]Section 315(a) of the Communications Act states in pertinent part:

Appearance by a legally qualified on any --

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be a use of a broadcasting station within the meaning of this subsection.

> That is correct, provided he did not *initiate* the newscast, provided he did nothing affirmatively to advance his own candidacy -- in other words, if his appearance was part of the information given to the public as a newscast. [*Id.* at 14446 (emphasis added).]

On the House side, Congressman Brown stated with regard to a candidate's exempt appearance:

> He cannot put on a program of his own to help his own candidacy. Instead, it must be newsworthy, but it must be instigated by the station or by the news reporters that interview him. [105 Cong. Rec. 16225 (1959).]

In addition to specifying that candidates were not to initiate exempt appearances, the legislative history of the 1959 amendments show that Congress did not intend that candidates have control over the "format and production" of these appearances. S.Rep. No. 562, 86th Cong. 1st Sess. 11 (1959). The Senate Report stated:

> It should be noted that the programs that are being exempted in this legislation have one thing in common. They are generally news and information-type programs designed to disseminate information to the public and in almost every instance the format and production of the program is under the control of the broadcast station, or the network in the case of a network program. [S. Rep. No. 562, 86th Cong. 1st Sess. 11 (1959).]

The year after the news exemptions were enacted, the Commission ruled that appearances on newscasts by a weatherman who was a legally qualified candidate were not subject to the "equal opportunities"provision of Section 315 by virtue of their falling into one of the four exempt news categories. *KWTX Broadcasting Co.*, 40 FCC 304 (1960), *aff'd sub nom. Brigham v. FCC*, 276 F.2d 828, 830 (5th Cir.

1960). Subsequently, the Commission recognized that this decision was inconsistent with the legislative history of the 1959 amendments and ruled that a candidate's appearance "on a news-type program in which he has participated in 'the format and production'" would be subject to "equal opportunities." *Use of Station by Newscaster Candidate for Public Office*, 40 FCC 433, 434 (1965) (hereinafter *Newscaster Candidacy*). *See* S. Rep. No. 562, 86th Cong. 1st Sess. 11 (1959). (*See* pars. 8 and 9, below, for further discussion).

B. CONSTITUTIONAL ARGUMENTS

4. While generally challenging the constitutionality of Section 315, Branch's specific concern here is that the Commission's interpretation of it, as applied to news reporters/candidates, is unconstitutional.[4] Branch alleges, citing *CBS Inc. v. FCC*, 453 U.S. 367, 395 (1981) (quoting *Columbia Broadcasting System, Inc. v. Democratic National Commitee*, 412 U.S. 94, 110 (1973), that the Commission's exclusion of reporters from the news exemptions intereferes with the ability of braodcasters to exercise their journalistic freedoms and singles out news reporters/candidates "from

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[4] To the extent that Branch is urging that the Commission cease enforcing Section 315 based on constitutional objections to it, we delcine to take that action. The Commission has previously expressed its concern to Congress about the continuing wisdom of Section 315 and other content-control sections of the Communications Act and asked that consideration be given to repealing these provisions. We recognize that the constitutionality of a government agency's actions must always be subject to review, and in light of speech and press related concerns associated with its regulatory policies, the Commission has been particularly mindful of the constitutional dimensions of its actions. This is not, however, a proceeding in which there is a well developed record on the constitutional balancing involved in evaluating Section 315. We are mindful, moreover, that such constitutional decisions have "generally been thought beyond the jurisdiction, of administrative agencies..." *Oestereich v. Selective Service Board*, 393 U. S. 233, 242 (1968). Thus, we decline to undertake a review here of previous determinations as to the constitutionality of Section 315.

exercising any form of speech over the airwaves." We find these arguments to be without merit. Congress has determined in enacting Section 315 that there is a governmental interest in assuring that licensees afford equitable treatment to all candidates running for a particular office, and that this interest justifies imposing certain limitations on broadcast speech. *McCarthy v. FCC*, 390 F.2d 471, 473 (D.C. Cir. 1968). Moreover, Section 315 does not discriminate against Branch and those individuals similarly situtated because all candidates for public office are treated in the same manner. As the Supreme Court observed in *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973):

> The restrictions...are not aimed at particular parties, groups, or points of view, but apply equally to all partisan, activities of the type described. They discriminate against no racial, ethnic, or religious minorities. Nor do they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls. [*Id.* at 564.]

5. Branch also alleges that the Commission's application of Section 315 is unconstitutionally overbroad because it prohibits

nonpolitical appearances by candidates.[5] The Commission and the court of appeals specifically addressed the issue of "nonpolitical" uses where a legally qualified candidate asserted that his appearances as an entertainer should be exempt from the "equal opportunities" requirement of Section 315. *Pat Paulsen*, 33 FCC 2d 297 (B/c Bur. 1972), *review denied*, 33 FCC 2d 835 (1972) *aff'd sub nom. Paulsen v. FCC*, 491 F.2d 887 (9th Cir. 1974). (hereinafter *Paulsen*). The Commission, in denying the application for review, emphasized that Section 315 did not distinguish between political and nonpolitical "uses." Furthermore, the Commission pointed out that under the no-censorship provision of Section 315, a licensee could not require a candidate to present only nonpolitical material during a broadcast. *See Farmers Educational and Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525, 529 (1959). Further, in upholding the Commission's *Paulsen* decision, the court noted that a political and nonpolitical definitional approach to "uses" could raise serious first amendment problems in terms of enlarging the Commission's involvement in broadcasting operations. *Paulsen*, 491 F.2d at 891. Accordingly, we believe our interpretation is both consistent with the congressional intent and is reasonably tailored to avoid first amendment concerns.

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[5]Branch asserts that under the Commission's current application of Section 315 one of three situations would occur if he were to become a legally qualified candidate for town council: (1) his employment duties with KOVR would no longer include on-the-air appearances; or (2) he would have to take a leave of absence without pay with no assurance of being rehired after the election; or (3) KOVR would be required to provide his legally qualified opponents with free air time for all his appearances as a news reporter. Branch fails to mention, however, that it is possible for a station to seek a waiver or partial waiver from the opposing candidates of their "equal opportunities" rights where on-the-air employees of a station have become candidates for public office. *See Senate Committee on Commerce*, 40 FCC 357 (1962); *Licensee Obligations in Political Campaigns*, 14 FCC 2d 765 (1968). Such waivers would generally be binding as long as they were given with full knowledge of the relevant facts concerning the broadcasts. *WBTW-TV*, 5 FCC 2d 479 (1966).

C. REQUEST TO MODIFY INTERPRETATION OF SECTION 315

6. Branch also requests that the Commission modify its present interpretation of Section 315 and thus treat appearances by news reporters/candidates as exempt. Branch contends that the legislative history of the 1959 amendments clearly indicates that Congress did not intend for such appearances to be subject to "equal opportunties". In this regard, Branch asserts that it is "ironic" that in *Newscaster Candidacy* the Commission found the appearance of an employee newscaster to be a "use," but at the same time the Commission recognized the 1959 amendments were designed to encourage news coverage. To this effect, Branch cites *Newscaster Candidacy* where the Commission stated:

> Thus the main purpose of the amendment was to allow greater freedom to the broadcaster in reporting news to the public, that is to say, in inserting appearances of candidates as part of the contents of news programs. [*Newscaster Candidacy*, 40 FCC at 434.]

7. In light of the previously cited legislative history, *supra*, par. 3, it is clear that when a candidate appears on the air in the capacity of a news reporter, that appearance is not the type which Congress intended to exempt from the "equal opportunties" provision of Section 315. A news reporter, by the very nature of his position, may initiate and control his on-the-air apppearances and is not the subject of the news program. These are precisely the types of activities that Congress identified as being inappropriate for a candidate to participate in when performed in conjunction with his appearance on an exempt program. Therefore, where a legally qualified candidate for public office appears on a bona fide newscast in the capacity of a news reporter, rather than as the subject of the news, such appearances are subject to the "equal opportunities" requirement of Section 315. *Newscaster Candidacy, supra; See generally, Henry Geller*, 95 FCC 2d 1236 (1983), *aff'd sub nom. League of Women Voters Education Fund v. FCC*, 731 F.2d 995 (D.C. Cir. 1984). To

conclude otherwise, would be inconsistent with Congress' basic objective for enacting Section 315 -- to prevent a legally qualified candidate from gaining an advantage over an opponent through favoritism or gaining access to a broadcast facility. S. Rep. No. 562, 86th Cong., lst Sess. 8-9 (1959); *Paulsen v. FCC, supra.*. The *Paulsen* court agreed that the exposure which a candidate receives from any television appearance may render an invaluable advantage to his election campaign. In this regard, the court stated:

> A candidate who becomes well-known to the public as a personable and popular individual through "nonpolitical" appearances certainly holds an advantage when he or she does formally discuss political issues to the same public over the same media. [*Paulsen v. FCC*, 491 F.2d at 891].

8. In view of the foregoing, and pursuant to Section 1.2 of the Commission's rules and regulations, the request for declaratory ruling IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, SECRETARY

No. 87-628

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM H. BRANCH, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Communications Commission correctly concluded that the "equal time" requirement contained in Section 315(a) of the Communications Act of 1934, 47 U.S.C. 315(a), is triggered when a candidate appears on-the-air in the course of his employment as a television news reporter.

2. Whether Section 315(a) violates the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 824 F.2d 37. The initial order of the Federal Communications Commission (Pet. App. 35a-44a) is reported at 101 F.C.C.2d 901. The order of the Federal Communications Commission on reconsideration (Pet. App. 33a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a) was entered on July 21, 1987. The petition for a writ of certiorari was filed on October 16, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

STATEMENT

1. Prior to 1959, Section 315(a) of the Communications Act of 1934, 47 U.S.C. (1958 ed.) 315(a), provided

that whenever a television or radio broadcast station permitted "a legally qualified candidate for any public office" to "use" the station, it was required to "afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." This statutory provision is often referred to as the "equal time" requirement.

The Federal Communications Commission initially concluded that when a candidate's appearance on a station was the result of "a routine news broadcast" in which the candidate was the subject of the news, the appearance was not a "use" of the station within the meaning of Section 315 and, therefore, did not require the station to provide equal time to opposing candidates. *Use of Broadcast Facilities by Candidates for Public Office*, 23 Fed. Reg. 7817, 7817-7818 (1958); *Allen H. Blondy*, 40 F.C.C. 284, 285 (1957). The Commission further concluded that when the candidate was a station employee who appeared during a newscast as a reporter rather than as the subject of the newscast, the appearance was a "use" of the station and, therefore, did give rise to the equal time obligation. *Use of Broadcast Facilities by Candidates for Public Office*, 23 Fed. Reg. 7818 (1958); *Kenneth E. Spengler*, 40 F.C.C. 279 (1956); see also *KUGN*, 40 F.C.C. 293 (1958); *KTTV*, 40 F.C.C. 282 (1957).

The Commission changed its interpretation of Section 315(a) in 1959, concluding that any appearance by a candidate on a newscast constituted a "use" of the station creating equal time obligations. See *CBS, Inc. (Lar Daly)*, 18 Rad. Reg. (P&F) 238 (Feb. 19, 1959), reconsid. denied, 26 F.C.C. 715 (1959). Congress quickly acted to set aside the FCC's new statutory interpretation. It amended the statute by adding a sentence to Section 315(a) stating that "[a]ppearance by a legally qualified candidate on any (1) bona fide newscast, (2) bona fide news interview, (3) bona

fide news documentary * * *, or (4) on-the-spot coverage of bona fide news events * * *, shall not be deemed to be a use of a broadcasting station within the meaning of this subsection." Act of Sept. 14, 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557. The legislative history of this amendment makes clear that its purpose was to overrule the *Lar Daly* decision. See, *e.g.*, S. Rep. 562, 86th Cong., 1st Sess. 2-10 (1959); H.R. Rep. 802, 86th Cong., 1st Sess. 2-4 (1959).

2. Petitioner was an employee of television station KOVR in Sacramento, California, during the period relevant to this litigation. He worked as a news reporter and made regular appearances in that capacity on the station's daily news programs. In 1984, petitioner decided to seek election to the town council in the nearby community of Loomis, California. Upon being informed of petitioner's planned candidacy, the management of KOVR advised petitioner that, because of the equal time obligations that Section 315(a) might impose upon the station in the event petitioner continued to appear on the air, petitioner would be required to take an unpaid leave of absence during his candidacy.[1]

Petitioner chose not to pursue his candidacy. He instead petitioned the Commission for a declaratory ruling that the exemptions set forth in Section 315(a) encompass candidate appearances during newscasts even when the candidate appears as a newscaster. Petitioner argued that a contrary interpretation of the statute would violate the First Amendment.

The Commission denied the petition (Pet. App. 35a-44a). The Commission observed that it previously had concluded that "a candidate's appearance 'on a news-type

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[1] It was estimated that the station might otherwise be required to make as much as 33 hours of response time available to all of petitioner's opponents. See Pet. App. 3a & n.1.

program in which he has participated in "the format and production" ' would be subject to [Section 315(a)'s] 'equal opportunities' " requirement. *Id.* at 40a (quoting *Use of Station by Newscaster Candidate for Public Office*, 40 F.C.C. 433, 434 (1965)). It stated that "[a] news reporter, by the very nature of his position, may initiate and control his on-the-air appearances and is not the subject of the news program. These are precisely the types of activities that Congress identified as being inappropriate for a candidate to participate in when performed in conjunction with his appearance on an exempt program" (Pet. App. 43a). The Commission stated that to conclude that a news reporter's appearances fell within the statutory exemption "would be inconsistent with Congress' basic objective for enacting Section 315—to prevent a legally qualified candidate from gaining an advantage over an opponent through favoritism or gaining access to a broadcast facility" (*id.* at 44a).

The Commission rejected petitioner's claim that the Commission's interpretation of Section 315 was unconstitutional because it interfered with "the ability of broadcasters to exercise their journalistic freedoms" (Pet. App. 40a). The Commission observed that "Congress has determined in enacting Section 315 that there is a governmental interest in assuring that licensees afford equitable treatment to all candidates running for a particular office, and that this interest justifies imposing certain limitations on broadcast speech" (*id.* at 41a). It further stated that "Section 315 does not discriminate against [petitioner] and those individuals similarly situated because all candidates for public office are treated in the same manner" (*ibid.*).

The Commission declined to address petitioner's general challenge to the constitutionality of Section 315. The Commission observed that "[t]his is not * * * a proceeding in which there is a well developed record on the constitu-

tional balancing involved in evaluating Section 315" and that "such constitutional decisions have 'generally been thought beyond the jurisdiction[ ] of administrative agencies' " (Pet. App. 40a n.4 (citation omitted)). The Commission therefore "decline[d] to undertake a review * * * of previous determinations as to the constitutionality of Section 315" (*ibid.*).

3. The court of appeals unanimously affirmed the Commission's determination (Pet. App. 1a-31a). The court first observed that as the statute stood prior to the 1959 amendment, on-the-air work by a reporter was classified as a "use" of the broadcast station triggering the equal time obligation (Pet. App. 8a-10a). The court of appeals found that "[t]he legislative history of the 1959 amendments conclusively establishes three critical and overlapping points. First, Congress' central concern in taking action was to overrule the Commission's *Lar Daly* decision" (Pet. App. 11a). Second, "the purpose of overruling *Lar Daly* was to restore the understanding of the law that had prevailed previously. * * * That understanding * * * required 'equal opportunities' whenever any candidate appeared on the air, unless the candidate was the subject of 'a routine news broadcast' " (*id.* at 12a-13a). Third, "Congress objected to the imposition of 'equal opportunities' obligations on any station that carried news coverage of a candidate, because it deterred the broadcast media from providing the public with full coverage of political news events" (*id.* at 13a-14a).

The court found that the language of the statutory exemptions reflects these purposes. The " '[a]ppearance by a legally qualified candidate,' which is not 'deemed to be use of a broadcasting station,' is coverage of the candidate that is presented to the public as news. * * * 'By modifying all four categories [not deemed to be "use" with the phrase "bona fide"], Congress plainly emphasized its reliance on

newsworthiness as the basis for an exemption' " (Pet. App. 15a (citation omitted)). The court explained that "[w]hen a broadcaster's employees are sent out to cover a news story involving other persons, * * * the 'bona fide news event' is the activity engaged in by those other persons, not the work done by the employees covering the event. * * * For example, when a broadcaster's employees are sent out to cover a fire, the fire is the 'bona fide news' event and the reporter does not become a part of that event merely by reporting it" (*id.* at 16a).

The court found that "[t]his reading of the statute as not exempting newscasters is also compelled by the weight of the legislative history" (Pet. App. 16a). Congress's intent was to return to the pre-*Lar Daly* interpretation of the statute, and "[t]he status quo before *Lar Daly* allowed a candidate to appear on the air as the *subject* of 'routine' news coverage without triggering the 'equal opportunities' rule, but did not exempt appearances by a candidate who is 'regularly employed as a station announcer' " (*id.* at 16a-17a (emphasis in original; citation omitted)). The court stated that "[n]owhere in the legislative history is there the slightest indication that Congress intended, for the first time, to sweep the latter class of appearances within the scope of the exemption" (*id.* at 17a).

The court also noted that Congress expressed considerable concern about the possibility that "sham" news events staged by a candidate might be found to be exempt from the equal time obligation; it resolved this problem by limiting the exemption to "bona fide" events. "In denying any exemption for candidate appearances through 'sham' news events, Congress once again expressed its view that exemption should be made only for on-air appearances that are intrinsically newsworthy." Pet. App. 17a-18a.

That purpose is furthered by the Commission's interpretation of the statute.[2]

The court of appeals rejected petitioner's claim that Section 315(a) violates the First Amendment (Pet. App. 24a-26a). Petitioner relied upon *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), in which this Court invalidated a statute regulating the content of newspapers. The court of appeals observed that this Court "has expressly held * * * that the first amendment's protections for the press do not apply as powerfully to the broadcast media" (Pet. App. 24a, citing *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969)). It concluded that "[w]hile doubts have been expressed that the scarcity rationale [underlying *Red Lion*] is adequate to support differing degrees of first amendment protection for the print and electronic media, it remains true, nonetheless, that [petitioner's] first amendment challenge is squarely foreclosed by *Red Lion*" (Pet. App. 24a (citations omitted)).[3]

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[2] Judge Starr stated that "a more natural statutory interpretation would exempt newscast reporters who are just doing their jobs from the 'equal opportunities' requirement of section 315(a)" (Pet. App. 30a (Starr, J., concurring)). He found that Congress's intent was ambiguous, however, and upheld the Commission's order on the ground that its interpretation of the statute was reasonable (*id.* at 31a).

[3] The court of appeals rejected petitioner's invitation to "step[] away" from *Red Lion*, noting that this Court had "recently reaffirmed *Red Lion* and disavowed any intention 'to reconsider [its] longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.' " Pet. App. 25a (quoting *FCC* v. *League of Women Voters*, 468 U.S. 364, 377 n.11 (1984)). The court of appeals observed that "[t]he Commission may now have sent just such a signal" in its report on the fairness doctrine (Pet. App. 25a-26a, citing *General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985)).

The court of appeals rejected petitioner's contention that the Commission's interpretation of the statute impermissibly burdened his

ARGUMENT

1. a. Petitioner contends (Pet. 7-13) that the Commission and the court of appeals erred by concluding that petitioner's appearances on television as a news reporter would trigger the equal time obligation set forth in Section 315(a) of the Communications Act of 1934, 47 U.S.C. 315(a).

The court of appeals correctly recognized that petitioner's claim rests upon the meaning of the language added to Section 315(a) by the 1959 amendment (see Pet. App. 8a-10a). Before the statute was amended, the appearance of a candidate on a news broadcast in his capacity as a reporter plainly triggered the equal time obligation. The statute then provided that "[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcast station." And the Commission had concluded that the appearance of a candidate as a reporter rather than as the subject of a news broadcast gave rise to the equal time obligation. *Use of Broadcast*

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right to run for office because he could not both retain his job and run for office (Pet. App. 21a-23a). The court stated that " '[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.' " *Id.* at 22a (quoting *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972)). The court observed that "nobody has ever thought that a candidate has a right to run for office and at the same time to avoid all personal sacrifice," observing that this Court has upheld several statutes requiring prospective candidates to choose between retaining their jobs and running for office (Pet. App. 22a-23a). The court concluded that "the burdens imposed by section 315 [are] justifiable as 'both reasonable and necessary to achieve the important and legitimate objectives of encouraging political discussion and preventing unfair and unequal use of the broadcast media' " (*id.* at 23a (citation omitted)).

Facilities by Candidates for Public Office, 23 Fed. Reg. 7817 (1958); see also page 2, *supra*.

The portion of Section 315(a) added by the 1959 amendment provides in pertinent part:

> Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

The court of appeals correctly concluded (Pet. App. 15a-16a) that this language does not provide an unambiguous answer to the question whether the appearance of a candidate as a news reporter constitutes a use of the broadcast station triggering the equal time obligation.

The first two exemptions set forth in the 1959 amendment, viewed in isolation, would appear to exempt a candidate's appearances as a news reporter from the equal time obligation. The third exemption "relates the candidate's appearance [on a news documentary] to the subjects covered in the program. If the candidate's appearance has nothing to do with the subjects that are being covered as news—whether because the candidate is a regular employee on all such [documentary] programs or, to take another example, because the candidate is being offered a gratuitous appearance that realistically is unrelated to the news content of the program—then the exemption does not apply" (Pet. App. 16a). Under the

third exemption's plain language, therefore, a candidate's appearance on a documentary program in his capacity as a news reporter would not be exempt from the equal time requirement.

The fourth exemption similarly does not seem to encompass the appearance of a candidate acting as a news reporter. As the court of appeals explained (Pet. App. 16a), "[w]hen a broadcaster's employees are sent out to cover a news story involving other persons, * * * the 'bona fide news event' is the activity engaged in by those other persons, not the work done by the employees covering the event. * * * For example, when a broadcaster's employees are sent out to cover a fire, the fire is the 'bona fide news' event and the reporter does not become a part of that event merely by reporting it."

Congress surely did not intend the application of the equal time provision to a reporter/candidate's broadcast appearances to vary depending upon the type of news broadcast upon which the reporter appears. In view of the statute's ambiguity, it is necessary to look to the legislative history to ascertain Congress's intent with respect to that question. See also *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("[a]bsent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive"); *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 16 (1976). Review of the legislative history establishes beyond any doubt that Congress intended appearances by a candidate in his capacity as a news reporter to be subject to the equal time requirement. As the court of appeals stated, "[t]he weight of the legislative history [supporting that conclusion] * * * is overwhelming" (Pet. App. 20a).

First, as the court of appeals found, Congress's "central concern" in adopting the 1959 amendment was to overrule the Commission's decision in *CBS, Inc. (Lar Daly)*, 18

Rad. Reg. (P&F) 238 (Feb. 19, 1959), reconsid. denied, 26 F.C.C. 715 (1959). The Commission in that decision rejected its prior determination that an appearance by a candidate as the subject of a news broadcast did not constitute a "use" of a broadcast station within the meaning of Section 315(a); the Commission held that any appearance by a candidate on a newscast constituted a "use" of the station creating an equal time obligation. The legislative history makes clear that the *Lar Daly* decision was the principal impetus for congressional action in 1959. See, *e.g.*, S. Rep. 562, 86th Cong., 1st Sess. 2-10 (1959); H.R. Rep. 802, 86th Cong., 1st Sess. 2-4 (1959); see also Pet. App. 11a-12a & n.6 (collecting congressional references to *Lar Daly*).

Congress's purpose in overruling *Lar Daly* "was to restore the understanding of the law that had prevailed previously." Pet. App. 12a; see also S. Rep. 562, *supra,* at 2-3, 17-19; H.R. Rep. 802, *supra,* at 2-3. That understanding "allowed a candidate to appear on the air as the *subject* of 'routine' news coverage without triggering the 'equal opportunities' rule, but did not exempt appearances by a candidate who is 'regularly employed as a station announcer.' Nowhere in the legislative history is there the slightest indication that Congress intended, for the first time, to sweep the latter class of appearances within the scope of the exemption" (Pet. App. 17a (emphasis in original; citations omitted)).[4]

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[4] The court of appeals observed that "Congress objected to the imposition of 'equal opportunities' obligations on any station that carried news coverage of a candidate, because it deterred the broadcast media from providing the public with full coverage of political news events, and many other news events as well" (Pet. App. 13a-14a). Thus, "[t]o the extent that Congress may have done more than reverse *Lar Daly*, by exempting broadcast coverage of news interviews and news documentaries in addition to newscasts and on-the-spot coverage of news events, it did so to protect a station's ability to exercise broad

Second, Congress emphasized that candidates' appearances on news programs were exempt from the equal time rule because those appearances were under the control of the broadcast station rather than the candidate. S. Rep. 562, *supra,* at 11; 105 Cong. Rec. 16225 (1959) (remarks of Rep. Brown) (the candidate "cannot put on a program of his own to help his own candidacy. Instead, it must be newsworthy, but it must be instigated by the station or by the news reporters that interview him"); *id.* at 14446 (remarks of Sen. Pastore). As the Commission found, "[a] news reporter, by the very nature of his position, may initiate and control his on-the-air appearances and is not the subject of the news program" (Pet. App. 43a). Congress's reliance upon the independent news judgment of the station and its employees as a means of

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discretion in choosing which *newsworthy events* to present to the public" (*id.* at 14a (emphasis in original)). The court of appeals correctly concluded that this congressional purpose is fully served by exempting appearances by a candidate as the subject of news coverage from the equal time obligation and does not weigh in favor of extending the exemption to appearances by a candidate in his capacity as a news reporter; "[i]t is irrelevant to [Congress's concern for protecting a station's discretion to select the newsworthy events it wants to cover] whether a station has broad discretion to determine which of its employees will actually present the news on the air" (*id.* at 17a).

Accordingly, there is no basis for petitioner's suggestion (Pet. 12-13) that the decision below conflicts with the same court of appeals' previous decision in *Chisholm* v. *FCC*, 538 F.2d 349 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976), which upheld the Commission's determination that candidate debates are exempt from the equal time obligation under the 1959 amendment even though debates were not exempt prior to the decision in *Lar Daly*. As the court of appeals here explained, *Chisholm* is justified by "Congress' intent to ensure that the public will have access to a broad array of newsworthy events"; that policy does not support an exemption for a newscaster/candidate when he appears on the air in his capacity as a newscaster. Pet. App. 18a n.11.

preventing candidates from manipulating the exemption to gain television exposure therefore weighs strongly in favor of excluding from the exemption a candidate's appearances in his capacity as a news reporter.

Third, Congress expressed considerable concern about "the possibility that 'sham' news events—events that are not bona fide news but are staged by the candidate—might be seen as exempt from the 'equal opportunities' rule" (Pet. App. 17a). By limiting the exemption to "bona fide" news events, "Congress * * * expressed its view that exemption should be made only for on-air appearances that are intrinsically newsworthy. At all times, the focus was not on preserving anyone's 'right' to appear on the air, but on preserving broadcasters' ability to present certain kinds of news programs and news events" (*id.* at 17a-18a (footnote omitted)). Since a candidate's appearances on the air as a news reporter are not intrinsically newsworthy, they do not fall within the exemption.

Fourth, Congress's basic objective in enacting Section 315(a) was "to prevent a legally qualified candidate from gaining an advantage over an opponent through favoritism or gaining access to a broadcast facility." Pet. App. 44a, citing S. Rep. 562, *supra,* at 8-9; *Paulsen* v. *FCC,* 491 F.2d 887 (9th Cir. 1974). Exempting a candidate/news reporter's on-the-air appearances from the equal time obligation would plainly give that candidate much greater television exposure than his opponents and, therefore, a considerable advantage over his opponents. For that reason, the exemption does not extend to such appearances.[5]

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[5] In addition, exempting a candidate/news reporter's appearances would "raise a station's news employees to an elevated status not shared by any of its other employees: although the work done on the air by any other employee on any other program would not be exempt,

Finally, the Commission's conclusion that the exemption does not extend to appearances by a candidate in his capacity as a news reporter should be upheld because it is reasonable. *NLRB* v. *United Food & Commercial Workers Union, Local 23,* No. 86-594 (Dec. 14, 1987), slip op. 10; *Chevron U.S.A. Inc.* v. *NRDC,* 467 U.S. 837, 842-844 (1984). In view of the ambiguity of the statutory language and the strong support for the Commission's view in the legislative history, the Commission's interpretation of the statute that it is charged with administering should be upheld. See Pet. App. 31a (Starr, J., concurring).[6]

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the work done on the air by news employees would be. Yet this novel division was never endorsed, or even discussed, by Congress" (Pet. App. 18a (citation omitted)).

[6] The Commission has not always adhered to the interpretation of the statute that it applied in the present case. In *KWTX,* 40 F.C.C. 304, aff'd *sub nom. Brigham* v. *FCC,* 276 F.2d 828 (5th Cir. 1960) (per curiam), the Commission concluded that the equal time obligation did not extend to on-the-air appearances by a weatherman who was a candidate for office. Five years later, the Commission again addressed this issue, stating that it had "re-examined the question of the applicability [in the newscaster/candidate context] of the 1959 amendment, and * * * researched at length the legal and legislative history considerations." *Use of Station by Newscaster Candidate for Public Office,* 40 F.C.C. 433, 434 (1965). Based upon that detailed consideration of the issue, the Commission reversed its position, concluding that the 1959 amendment did not exempt from the equal time rule the appearance of a newscaster/candidate in his capacity as a newscaster. The Commission has adhered to that position since 1965.

This Court has observed that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view" (*INS* v. *Cardoza-Fonseca,* No. 85-782 (Mar. 9, 1987), slip op. 25 n.30 (citation omitted)). The Court applied that principle in *Cardoza-Fonseca* on the basis of its conclusion that the agency had exhibited "a long pattern of erratic treatment" of the question of statutory interpretation presented in that case (*id.* at 25-26 n.30). Here, where the Commission "changed its position upon fuller con-

b. Petitioner argues (Pet. 7-9) that the decision below conflicts with *Brigham* v. *FCC*, 276 F.2d 828 (5th Cir. 1960) (per curiam). The court of appeals in *Brigham* reviewed the Commission's decision in *KWTX*, 40 F.C.C. 304 (1960), holding that the equal time obligation of Section 315(a) was not triggered by the appearance on the air of a weatherman (who was also a candidate for public office) when he appeared in his capacity as a weatherman. The Commission relied upon the exemption for "bona fide newscasts" contained in the 1959 amendment to the statute (40 F.C.C. at 305). The court of appeals upheld the Commission's determination in a brief decision, limiting its discussion of the statutory question to a brief paragraph that did not discuss the relevant legislative history (see 276 F.2d at 830).

As a threshold matter, it is far from clear that there is a square conflict between *Brigham* and the present case. The court of appeals in *Brigham* did not set out the reasons for its decision to uphold the Commission's interpretation of the statute; that decision might well have rested upon deference to the Commission's interpretation. And the conclusion that the Commission's former interpretation of the statute was reasonable does not necessarily conflict with a decision upholding the Commission's later, contrary interpretation of the statute. Pet. App. 31a (Starr, J., concurring) (noting that both readings of the statute were reasonable and therefore both would be upheld on judicial review); see also *Pattern Makers' League* v. *NLRB*, 473 U.S. 95, 117 (1985) (White, J., concurring).

At all events, five years after rendering the decision reviewed in *Brigham*, the Commission reconsidered the

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sideration of the issue for a very good reason, and has faithfully adhered to its current position for more than twenty years" (Pet. App. 20a), there is no basis for discounting the Commission's interpretation of the statute (*id.* at 31a (Starr, J., concurring) (deferring to the Commission's interpretation of Section 315(a))).

question on the basis of a full reexamination of the statutory language and legislative history. It concluded that its prior interpretation had been in error, and that the equal time obligation is triggered by a candidate's appearance in his capacity as a newscaster. *Use of Station by Newscaster Candidate for Public Office,* 40 F.C.C. 433 (1965). Since the Commission applies its own interpretation of the statute in its administrative proceedings, the question that would be presented to the Fifth Circuit on a future petition for review would be whether the Commission's current interpretation of the statute should be upheld. In view of the quite different posture in which *Brigham* was decided, the wholly conclusory nature of the decision in *Brigham,* and the comprehensive analysis of the statutory language and legislative history set forth in the decision below, we think it unlikely that the Fifth Circuit would adhere to the interpretation of the statute adopted in *Brigham* without first reconsidering the matter. Accordingly, unless and until the Fifth Circuit reaffirms *Brigham,* there is no conflict among the courts of appeals necessitating this Court's intervention.[7]

2. Petitioner also contends (Pet. 13-19) that Section 315(a) violates the First Amendment. For reasons we shall explain, we submit that this case does not present an appropriate occasion for consideration by this Court of that constitutional claim.

a. In *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), the Court concluded that the First Amendment permitted government regulation of the content of radio and television broadcasts that would be unconstitutional in other contexts: "[b]ecause of the scarcity of radio fre-

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[7] Moreover, the question presented here is of limited practical importance. Petitioner himself acknowledges (Pet. 8 n.8) that this is the first case in which the issue has arisen in more than 20 years.

quencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. * * * It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount" (*id.* at 390).

The Court recently reaffirmed the applicability of the *Red Lion* standard to First Amendment challenges to government regulation of broadcast media. See *FCC* v. *League of Women Voters,* 468 U.S. 364, 376 (1984). The Court appended the following footnote to that reaffirmation (*id.* at 376-377 n.11 (citation omitted)):

> The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.

Petitioner appears to acknowledge that Section 315 satisfies the constitutional standard set forth in *Red Lion* and its progeny.[8] He asserts instead that recent FCC decisions concerning the state of competition in the broadcast industry constitute the signal to which the Court referred in *League of Women Voters* and that the Court should grant certiorari in the present case to consider whether it is now appropriate to revise the *Red Lion* standard.

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[8] That proposition would appear to be beyond dispute because the Court in *Red Lion* affirmed the constitutionality of Section 315. See 395 U.S. at 391.

The Commission recently issued a comprehensive study of the fairness doctrine. See *General Fairness Doctrine Obligations of Broadcast Licensees,* 102 F.C.C.2d 143 (1985) [hereinafter *Fairness Doctrine Report*].[9] In one portion of its report, the Commission considered the continuing need for the doctrine "in light of the increase in the amount and type of information sources in the marketplace" (see *id.* at 196). The Commission concluded that "the growth of traditional broadcast facilities, as well as the development of new electronic information technologies, provides the public with suitable access to the marketplace of ideas so as to render the fairness doctrine unnecessary. Moreover, we find that the dynamics of the information services marketplace overall insures that the public will be sufficiently exposed to controversial issues of public importance." *Id.* at 197 (footnote omitted); see also *id.* at 208-218 (discussing state of competition among different types of media).

The Commission concluded its fairness doctrine report by finding that the doctrine is constitutionally "suspect" and that the doctrine disserves the public interest because "[i]nstead of furthering the discussion of public issues, [it] * * * inhibits broadcasters from presenting controversial issues of public importance." *Fairness Doctrine Report*, 102 F.C.C.2d at 156, 187, 225. The Commission declined to take any action on the basis of this conclusion, explaining that, because of strong congressional interest in the matter, "it would be inappropriate at this time for us to

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[9] The fairness doctrine imposes two separate obligations upon a broadcast licensee: the licensee must (1) provide coverage of controversial issues of public importance in the communities that it serves, and (2) provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues. See 47 C.F.R. 73.1910; *Columbia Broadcasting System* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 110-111 (1973); *Red Lion Broadcasting Co.*, 395 U.S. at 377-378.

either eliminate or significantly restrict the scope of the doctrine. Instead, we will afford Congress an opportunity to review the fairness doctrine in light of the evidence adduced in this proceeding" (*id.* at 148). Subsequently, in *Meredith Corp.* v. *FCC*, 809 F.2d 863 (D.C. Cir. 1987), a case in which the Commission had imposed a penalty on the basis of a violation of the fairness doctrine, the court of appeals remanded the matter to the Commission with directions to consider the broadcaster's constitutional challenges to the enforcement of the doctrine unless the Commission concluded that "in light of its Fairness Report it may not or should not enforce the doctrine because it is contrary to the public interest" (*id.* at 874).

Following the solicitation of public comments, the Commission issued a decision pursuant to the court of appeals' remand, concluding that it would no longer enforce the fairness doctrine because "the doctrine contravenes the first amendment and thereby disserves the public interest" (*Syracuse Peace Council* v. *Television Station WTVH*, 2 F.C.C. Rec. 5043 (1987)). The Commission first evaluated the doctrine under the *Red Lion* standard and found that "[b]ecause the net effect of the fairness doctrine is to reduce rather than enhance the public's access to viewpoint diversity, it affirmatively disserves the First Amendment interests of the public" and therefore fails to pass constitutional muster under the *Red Lion* standard (*id.* at 5052).

The Commission went on to suggest (2 F.C.C. Rec. at 5053 (footnote omitted)) that *Red Lion* no longer set the appropriate constitutional framework for the evaluation of First Amendment claims in the broadcast media context:

> We believe that the *1985 Fairness Report*, as reaffirmed and further elaborated on in today's action, provides the Supreme Court with the signal referred to in *League of Women Voters*. It also provides the

> basis on which to reconsider its application of constitutional principles that were developed for a telecommunications market that is markedly different from today's market. We further believe that the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore, in response to the question raised by the Supreme Court in *League of Women Voters,* we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press.

The Commission concluded that the fairness doctrine could not pass muster under that constitutional standard.

b. We agree with petitioner that the Commission's decision in *Syracuse Peace Council* provides the "signal" of a change in the media environment to which this Court referred in *League of Women Voters.* However, we disagree with petitioner's contention that the *Red Lion* standard should be reconsidered in this case.[10]

The factual findings that underlie the Commission's "signal" that reconsideration of *Red Lion* is appropriate are not a part of the record in this case. Those findings, which were made in the context of the Commission's assessment of the constitutionality of the fairness doctrine, are now pending on petitions for review in the

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[10] We express no opinion at this time regarding the constitutionality of Section 315. Should the Court conclude, contrary to our submission, that this is an appropriate case in which to reconsider the *Red Lion* standard, we will address that question in our brief on the merits. We note that neither the United States nor the Federal Communications Commission took a position regarding the constitutionality of Section 315 in the court below. See FCC C.A. Br. 19-20.

United States Court of Appeals for the District of Columbia Circuit.[11] This Court recognized first in *Red Lion* and more recently in *League of Women Voters* that facts regarding the broadcast industry are central to the First Amendment inquiry; for that reason, we submit that the Court should defer consideration of the constitutional issue raised by petitioner until the case in which the findings were made, and in which those findings are currently under appellate review, becomes ripe for this Court's consideration.

That course of action will have the additional benefit of permitting the Court to address this important constitutional question in a context—unlike the present one—in which the Commission, in its *Fairness Doctrine Report* and the subsequent decision in *Syracuse Peace Council,* has developed a full factual record concerning both the nature of the challenged government regulation and the characteristics of the broadcast industry. Cf. *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986) (recognizing that a full factual record is likely to aid resolution of First Amendment issues in the cable television context).

To be sure, this Court may not be required to reach the question regarding the continued vitality of *Red Lion*'s constitutional holding in a future case arising out of the fairness doctrine proceeding.[12] But that possibility is not a

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[11] See *Syracuse Peace Council* v. *FCC*, No. 87-1516 (D.C. Cir.). The petitions for review of the *Fairness Doctrine Report* proceeding were dismissed as moot after the Commission issued its order in *Syracuse Peace Council*. See *Radio-Television News Directors Ass'n* v. *FCC*, No. 85-1691 (D.C. Cir. Sept. 23, 1987). Petitions for reconsideration in the *Syracuse Peace Council* proceeding are now pending before the Commission.

[12] The District of Columbia Circuit has concluded that the fairness doctrine is not required by statute. See *Telecommunications Research*

sufficient reason for the Court to consider the question here.[13] Indeed, because the Commission's order in the fairness doctrine case is now pending before the court of appeals on judicial review, consideration of the constitutional question by this Court in the present case would be premature. The court of appeals must review the Commission's factual determinations as well as its legal conclusions (see 5 U.S.C. 706). The possibility therefore remains that the Commission's order could be modified or vacated in whole or in part and that further factual development or analysis could occur in that case. Thus, we submit that the Court should not reconsider *Red Lion* on the basis of the Commission's findings until those findings have themselves been reviewed by the court of appeals.[14]

& Action Center v. *FCC*, 801 F.2d 501 (D.C. Cir. 1986), cert. denied, No. 86-1371 (June 8, 1987). Should this Court agree with that conclusion, it need not directly confront the question of the constitutionality of the fairness doctrine. The sole issue would be whether the Commission's decision to eliminate the doctrine is "arbitrary, capricious, [or] an abuse of discretion" (5 U.S.C. 706(2)(A)). However, the Commission concluded that "the policy and constitutional considerations in this matter are inextricably intertwined and that it would be difficult, if not impossible, to isolate the policy considerations from the constitutional aspects underlying the doctrine"; it therefore decided to "address the policy and constitutional issues together" (*Syracuse Peace Council*, 2 F.C.C. Rec. at 5046 (footnotes omitted)). For that reason, the Court would likely address important aspects of the constitutional question in the course of reviewing the Commission's administrative determination.

[13] Indeed, the present case also presents a statutory question (discussed in point 1, *supra*) that could obviate the need to reach the constitutional issue.

[14] The fact that petitions for reconsideration of the *Syracuse Peace Council* order are now pending before the Commission provides an additional reason for this Court to decline to act upon the Commission's "signal" at this juncture.

Moreover, this Court's deliberations on the First Amendment issue might well be assisted by the court of appeals' evaluation of the Commission's conclusions. In sum, this Court should await resolution of *Syracuse Peace Council* so as to avoid prematurely addressing this important First Amendment issue in the present case.

Finally, the Court need not consider the constitutional claim here out of any concern of fairness to petitioner. This is not a case in which a constitutional issue is presented to this Court for the first time; the Court addressed the claim raised by petitioner in its decision in *Red Lion*. We submit that where a litigant urges this Court to reconsider existing constitutional doctrine, the Court is well advised to exercise considerable discretion in staying its hand until it is presented with the case that best illuminates the question presented for decision.

That is especially so where, as here, petitioner has not suffered any sanction such as a prison sentence or a fine. All that has happened is that he has not obtained the declaratory relief he had sought. Indeed, petitioner will be able to gain the benefit of any reconsideration of *Red Lion* by filing a new petition for a declaratory order if the Court subsequently alters the relevant constitutional standard.

For all of these reasons, we urge the Court to decline to consider in this case the constitutional question presented by petitioner.[15]

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[15] Petitioner also asserts (Pet. 19 n.22) that Section 315 violates the First Amendment because it "condition[s] his right to run for elective office on his willingness to sacrifice his career as a broadcast journalist," although he does not appear to present that question for review by this Court. Compare Pet. i. In any event, the court of appeals properly rejected this claim (see Pet. App. 21a-23a), and that determination accords with the decision of another court of appeals rejecting a similar claim (see *Paulsen* v. *FCC*, 491 F.2d 887 (9th Cir. 1974)). There is accordingly no reason for review of that claim by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 87-628

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM H. BRANCH,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. The most notable position taken by respondents in their Opposition to the Petition For Writ of Certiorari is no position—they expressly refuse to defend the constitutionality of section 315. (Opp. 20 n.10) Indeed, respondents "agree with petitioner that the Commission's decision in *Syracuse Peace Council* provides the "signal" of a change in the media environment to which this Court referred in *League of Women Voters*." (Opp. 20) But respondents ask this Court not to defer to the Federal Communications Commission's ("Commission's") "comprehensive study of the fairness doctrine" (Opp. 18) until its "findings have . . . been reviewed by the court of appeals." (Opp. 22) On the other hand,

respondents ask the Court to defer to its judgment in matters of statutory interpretation. (Opp. 14-15) This confusion about the relative deference due the Commission precisely reverses the appropriate standard of review: courts should accord great weight to the Commission's investigations of fact, *Meredith Corp. v. FCC*, 809 F.2d 863, 871 (D.C. Cir. 1987), but need not "rubber stamp" its statutory interpretations. *NLRB v. Brown*, 380 U.S. 278, 291 (1965). Under the proper standard, respondents' statutory interpretation fails to obscure the plain meaning of section 315 exemptions and the Commission's factual findings provide a basis for reviewing the law's constitutionality.

2. a. Respondents' interpretation of section 315 is flawed by an excessively narrow view of the congressional purpose underlying the 1959 amendments. Branch is not covered by the newscast exemption, respondents assert, because the amendments were adopted only to restore the law prior to the Commission's decision in *CBS, Inc.*, 18 Rad. Reg. (P&F) 238 (1959) ("*Lar Daly*"). (Opp. 10-11) This reading of the amendments overlooks Congress' broadly remedial purpose to preserve broadcasters' independent editorial judgment. (Pet. 11-12) It also ignores over ten years of administrative and judicial interpretation of the amendments which expressly repudiated such a crabbed view.[1]

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[1]The Commission fashioned the newscaster candidate rule at a time when it was applying an exceedingly restrictive view of the amendments' scope. *See Use of Station by Newscaster Candidate*, 40 F.C.C. 433 (1965) ("*WMAY*"). Beginning in the mid-1970s, however, it systematically reconsidered the legislative history of the amendments and concluded that its earlier, narrow interpretations had been mistaken. *E.g.*, *Aspen Institute Program on Communications & Society*, 55 F.C.C.2d 697 (1975), *aff'd sub nom. Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976) (reversing statutory analysis of ten years' duration). Specifically, the Commission concluded that its understanding of the statutory purpose as expressed in cases decided during the mid-1960s was too limited and that broadcasters editorial discretion should be maximized. *Chisholm*, 538 F.2d at 356-64; *See Office of Communication of the United Church of Christ v. FCC*, 590 F.2d 1062 (D.C. Cir. 1978). *See also Henry Geller*, 95 F.C.C.2d 1236 (1983), *aff'd sub nom. League of Women Voters Education Fund v. FCC*, 731 F.2d

b. Although respondents (quoting the court below) acknowlege that "Congress may have done more than reverse *Lar Daly*," they assert—without a credible basis—that licensees' "broad editorial discretion" is limited to "choosing which *newsworthy events* to present to the public." (Opp. 11-12 n.4) (emphasis in original). But this argument is predicated on the unsupported assumption that the selection of a particular reporter for a story is not in itself "newsworthy" and is not a product of editorial discretion. It is difficult to name a more fundamental act of editorial discretion than assigning stories to reporters. This Court has held that the Communications Act will not permit embroiling the Commission in "the day-to-day editorial decisions of broadcast licensees," among which is "their control over the selection of voices." *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 116, 120 (1973). With respect to the section 315 exemptions, the Commission ruled that "on-the-spot coverage of bona fide news events" applies both to "acts of gathering and disseminating news." *Henry Geller*, 95 F.C.C.2d at 1243. Respondents offer no persuasive reason why Branch's acts of disseminating the news in the context of a newscast are not likewise exempt.[2]

c. Respondents seek to avoid a split in the circuits by the unsupported assertion that the "Fifth Circuit would [not] adhere to the interpretation of the statute adopted in *Brigham* [*v. FCC*, 276 F.2d 828 (5th Cir. 1960)] without first reconsidering the matter." (Opp. 16) This argument is predicated on the

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995 (D.C. Cir. 1984); *Kennedy for President Committee v. FCC*, 636 F.2d 417 (D.C. Cir. 1980). Based on a thorough reading of the legislative history, these decisions confirm that the amendments reach far beyond the narrow confines of *Lar Daly*.

[2]Congress undoubtedly was interested in promoting the coverage of political events, but respondents point to no credible evidence showing that Congress wished to suppress other aspects of editorial discretion. Quoting the court below (App. 18a), respondents allege that a literal interpretation of section 315 would "raise a station's news employees to an elevated status not shared by any of its other employees. . . ." (Opp. 13 n.5) But this statement provides no reason to discount congressional intent to promote editorial discretion in *news* programs.

assumption, shared by the court below, that the Commission revised its approach to newscaster candidates in 1965 after fully evaluating the legislative history and that it has consistently applied section 315 to newscaster candidates ever since. (Opp. 14-16) But this characterization is misleading. The court in *Brigham* held that the newscaster's appearances were exempt because there was no suggestion of favoritism and "his employment is not something arising out of the election campaign, but, rather, is a 'regular job.'" 276 F.2d at 830. In contrast, the 1965 *WMAY* decision involved a broadcast station's news director, who controlled the newscast's "format and production." 40 F.C.C. at 433. Although the opinion contained dictum relating to station employees in general, the Commission stressed that its decision was "strictly limited to the facts." *Id.* at 434. Thus, the factual distinctions between *Brigham* and *WMAY*—not a closer examination of the legislative history as respondents now suggest—explains the different results. The Commission confirmed this interpretation in a policy statement reaffirming *Brigham* less than a year after the *WMAY* decision. *See Use of Broadcast Facilities by Candidates for Public Office*, 3 F.C.C.2d 463, 472-73 (1966). The Commission's contemporaneous interpretations indicate that *WMAY* did not "overrule" *Brigham*, thus removing any basis for respondents' suggestion that the split in the circuits has vanished.[3]

3. a. Respondents apparently agree that this Court should reassess the constitutional basis of broadcast regulation. But after detailing the Commission's findings regarding the abundance of media outlets and the chilling effect of the fairness doctrine (Opp. 18-20), respondents urge the Court to await "further factual development or analysis."[4] (Opp. 22)

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[3]In any event, the *WMAY* facts are inapplicable to Branch. Like the newscaster in *Brigham*, Branch is not part of station management and is not in control of the "format and production" of his assignments. (App. 3a) He merely presents stories as part of his "regular job," and it has never been suggested that KOVR has engaged in favoritism on his behalf.

[4]Respondents do not dispute the incontrovertable relevance to this case of the Commission's findings in the fairness doctrine proceedings.

What is missing from this argument is any indication of how a reviewing court could improve on the Commission's factfinding ability.[5] In its 1985 fairness doctrine inquiry, the Commission received formal written comments from more than one hundred parties and informal comments from many others. The Commission also held hearings in which it heard oral presentations. *General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 146 (1985). It reopened the record in *Syracuse Peace Council*, 2 FCC Rcd 5043, 5058 (1987), and received additional comments from more than fifty parties. At the same time, the Commission examined alternative methods of enforcing fairness doctrine obligations, and received comments from "broadcast licensees, broadcast networks, public interest groups and others." *Inquiry Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 2 FCC Rcd 5272, 5276 (1987). The Commission concluded that "the best alternative . . . continues to be an unregulated 'free marketplace of ideas.'" *Id.* Even before the Commission embarked on its extended analysis of the media environment, the one reviewing court to examine the 1985 fairness doctrine inquiry described its conclusions as "carefully documented and reasoned" and the Commission's failure to act on its findings "the very paradigm of arbitrary and capricious administrative action." *Meredith Corp.*, 809 F.2d at 867, 874. Respondents offer no plausible excuse for the Court to ignore these extensive findings from the Commission's reported decisions.

b. Respondents incorrectly assume that the fairness doctrine proceedings have been the only "signal" which the Court may consider.

i. The court below found that the speech of station KOVR and William Branch were chilled by political broadcasting regulations and concluded that "we do not believe the issues would be refined by any further development of

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[5]For example, it is unclear to what extent "further factual development or analysis" would result in a different talley of the number of broadcast outlets or new video technologies.

these facts." (App. 5a–7a) Contrary to respondents' callous assertion that Branch "has not suffered any sanction," the court below recognized that "'loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.'" (App. 5a, quoting *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)). Respondents further belittle Branch's First Amendment deprivation as being "of little practical importance" because "this is the first case in which the issue has arisen in more than 20 years." (Opp. 16 n.7) But the Commission conducted its inquiry in *WMAY* because of "the frequency with which these situations have arisen." 40 F.C.C. at 434. The extent to which such cases have ceased is merely evidence of section 315's chilling effect.

ii. As the "expert agency" with "more than fifty years of experience with the day-to-day implementation of communications regulation," *Syracuse Peace Council*, 2 FCC Rcd at 5046, the Commission recommended that Congress repeal section 315.[6] (Pet. 18) The Commission reported that during a 1960 moratorium on enforcement, "substantial amounts of time were provided by the networks to the candidates 'in good viewing hours without charge.'"[7] The Commission also noted that "relaxation of equal time restrictions has resulted in the provision of increased amounts of information to the electorate by the broadcast media." *1986 Legislative Proposals* at 928. For example, after the Commission reversed its longstanding interpretation of section 315 (in 1983) to allow broadcast stations to host candidate debates,[8] 45 percent of television stations in 1984 offered to sponsor debates for local, state and federal candidates (in addition to regular news coverage), and in 1986 the number of

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[6]Federal Communications Comm'n, *Legislative Proposal*, 927 (January 30, 1986) ("*1986 Legislative Proposals*").

[7]*Id.*, quoting Report to the Congress submitted pursuant to S.J. Res. 207, 86th Cong., 2–3 (March 1, 1961).

[8]*Henry Geller*, 95 F.C.C.2d at 1242-46.

stations making the same offer rose to 56 percent.[9] Conversely, the continuing existence of section 315 acts as a damper on such programming.

iii. The Commission is not alone in advising Congress that the scarcity rationale underlying broadcast regulation may now be obsolete. *See* U.S. Congress, Office of Technology Assessment, *Science, Technology and the First Amendment*, OTA-CIT-369 (Washington, DC: U.S. Govt. Printing Office, January 1988) at 28.

There is ample evidence by which this Court may well conclude that broadcast regulation should be reevaluated. Respondents do not disagree. But respondents counsel the Court to wait for another day even while acknowleging that the day may never come. (Opp. 21-22) In the meantime, the Commission's findings, both with respect to the fairness doctrine and section 315, reveal an on-going abridgement of broadcasters' First Amendment rights. The Court should resolve this intolerable situation, as it pledged to do in *Red Lion*.

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[9] *1986 Legislative Proposals* at 928. *See* Campaign Finance: Hearings Before the Subcommittee on Elections, Committee on House Administration, 100th Cong. 1st Sess. 687-88 (1987) (Statement of Edward O. Fritts, President, National Ass'n of Broadcasters). *See also* Allina and Geller, *The Equal Time Rule Suppresses Political Debate*, THE WASHINGTON POST, May 21, 1987.

Conclusion

For the foregoing reasons, this Court should grant the writ and reverse the decision of the court below.

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